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No. -

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALBERTA GAS CHEMICALS LIMITED and
ALBERTA GAS CHEMICALS, INCORPORATED,

Petitioners,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY,
DU PONT HOLDINGS, INC. and CONOCO INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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October 20, 1987

QUESTIONS PRESENTED

1. Did a panel of the Court of Appeals (Becker, J., dissenting) err when it held that *Brunswick** denies a plaintiff-competitor standing to recover damages it suffered as a direct result of an acquisition which is illegal under Section 7 of the Clayton Act, when those damages are attributable to a decrease of competition for product caused by the acquiring company's termination of the acquired company's plans to develop a substantial additional demand for the product?

2. Did a panel of the Court of Appeals (Becker, J., dissenting) err when it disregarded the principles of *Cargill*** and held that a plaintiff-competitor in a highly concentrated industry lacks standing to seek injunctive relief in connection with the illegal acquisition by the dominant company in the industry of a company which, absent the acquisition, would have entered the industry and destroyed the acquiring company's dominance, when the continued dominance of the acquiring company constitutes an anticompetitive threat to the plaintiff-competitor?

3. Did a panel of the Court of Appeals (Becker, J., dissenting) err in holding that when a dominant producer of a product in a highly concentrated industry acquires a company which is a purchaser of that product, it is irrelevant, in determining whether the acquisition may substantially lessen competition under Section 7 of the Clayton Act by depriving the dominant producer's competitors of sales to the acquired company, that the acquired company would have substantially increased its purchases of the product in the future if the acquisition had not occurred?

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* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

** *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S. Ct. 484 (1986).

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties in the Court of Appeals and the District Court.[1]

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[1] The stockholders of petitioner Alberta Gas Chemicals, Ltd. (each of which owns 50% of the stock of petitioner) are ALLARCO DEVELOPMENTS LTD. and Nova Corp. of Alberta. That petitioner partially owns a subsidiary known as Petralgas Chemicals N.Z., Ltd. The following entities are affiliates of that petitioner: AGEC Hydrogen Inc.; AGEC Security Corporation; A.G. Industries International, Inc.; A.G. New England States Inc.; A.G. Pipe Lines Inc.; A.G. Pipe Lines (Canada) Ltd.; The Alberta Gas Ethylene Company Ltd.; Algas Engineering Services Ltd.; Allarco Financial Corporation Ltd.; Allarco Group Ltd.; Allarco Holdings Inc.; Allarco Inc.; Allar-Tic, Inc.; B.V.H. Offshore Holdings Ltd.; Bow Valley Husky Offshore Drilling Ltd.; Canstar Oil Sands Ltd.; Cardev Ltd.; Carma Developers, Inc.; Carma Developers Ltd.; Carma Developers (Arizona) Inc.; Carma Developers (California) Inc.; Carma Developers (Colorado), Inc.; Carma Developers (Florida) Inc.; Carma Developers (Oregon) Inc.; Carma Developers (Texas) Inc.; Carma Developers (Washington) Inc.; Carma Investments, Ltd.; Carma Ltd.; Carma Properties, Inc. (Arizona); The Christian Companies, Inc.; CNG Fuel Systems; Energy Equipment & Systems Inc.; Energy Holding S.p.A.; ENESCO Chem Ltd.; Foothills Pipe Lines Ltd.; Foothills Pipe Lines (Alta.) Ltd.; Foothills Pipe Lines (North B.C.) Ltd.; Foothills Pipe Lines (North Yukon) Ltd.; Foothills Pipe Lines (Sask.) Ltd.; Foothills Pipe Lines (South B.C.) Ltd.; Foothills Pipe Lines (South Yukon) Ltd.; Fothills Pipe Lines (Yukon) Ltd.; Grove Italia S.p.A.; Grove Valve and Regulator Company; Husky Bow Valley Offshore Exploration Services Ltd.; Husky Industries Inc.; Husky Oil Company; Husky Oil International Inc.; Husky Oil Ltd.; Husky Oil NPR Operations, Inc.; Husky Oil Operations Ltd.; Interprovincial Steel and Pipe Corporation Ltd.; Ledeen Flow Control Systems Inc.; Ledeen Italia S.p.A.; Lifecycle, Inc.; Natgas Canada Inc.; Natgas U.S. Inc.; 915 Investments Ltd.; Northwest International Bank and Trust Company; Northwest Trust Company; Novacor Chemicals Inc.; Novacor Chemicals Ltd.; Novacor Moore Polyethylene Inc.; Novacorp Australia Pty. Ltd.; Novacorp Engineering Services Ltd.; Novacorp International Asia/Pacific Ltd.; Novacorp International Consulting Ltd.; Novacorp International (H.K.) Ltd.; Novacorp International Pipelines Limited; Novacorp (Malaysia) Sdn. Bhd.; Novacorp Pipelines Ltd.; Novacorp Pressure Transport Ltd.; NOVA Energy Systems Inc.; Novalta Japan Ltd.; Novalta Netherlands B.V.; Novalta Resources Ltd.; Novalta Transportation Inc.; Noval Technologies Ltd.; NovAtel Communications Inc.; NovAtel Communications Ltd.; NOVA/Husky Research Corporation Ltd.; Oil Term Investment Ltd.; Oil Term Holdings Ltd.; Pan-Alberta Gas Ltd.; Pan-Alberta Resources Inc.; Petrosec Exploration Inc.; Pipeline Hydraulics Engineering Inc.; Q&M Pipe Lines Ltd.; Seaboard Life Insurance Company; 69579 Alberta Ltd.; Standard Guarantee Corp.; Trans Quebec & Maritime Pipeline Inc.; Travellers Acceptance Corporation, Ltd.; Travellers Acceptance Corporation (California); UnoTex Petroleum Corporation; Western Star Trucks Inc.; Western Star Trucks Inc.—Camions Western Star Trucks Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Alberta Gas Chemicals Limited and Alberta Gas Chemicals, Incorporated ("Alberta Gas"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 17, 1987.

OPINIONS BELOW

The opinions of a panel of the Court of Appeals (including the dissenting opinion of Judge Becker) are set forth as Appendix A and are reported at 826 F.2d 1235. The opinions (which are not reported) of the District Court granting summary judgment to defendants are set forth as Appendices B and C. The judgment of the Court of Appeals affirming the grant of summary judgment and its order denying rehearing *in banc* are set forth as Appendices D and E, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 1987. (App. D). A timely Petition for Rehearing In Banc was denied on September 10, 1987. (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Sections 4, 7 and 16 of the Clayton Act, 15 U.S.C. §§15(a), 18 and 26, respectively, are set forth as Appendix F.

STATEMENT OF THE CASE

This case involves the right of petitioner Alberta Gas, a competitor in the methanol industry, to obtain damages and injunctive relief in connection with the acquisition by E. I. du Pont de Nemours & Company ("DuPont") of Conoco Inc. ("Conoco"). At the time of the acquisition, the methanol market was highly concentrated, DuPont was the largest producer and seller of methanol and Conoco was a substantial purchaser of methanol. Also at that time, Conoco had firm plans to become a major producer of methanol from coal. (Methanol is usually made from natural gas, a diminishing resource in this country). In connection with its plans to become a methanol producer, Conoco had firm plans to develop a market for the use of methanol as a fuel (to use in boilers and automobiles) and to make major purchases of methanol during the several years before its own methanol production facilities started operations.

Subsequent to the acquisition, DuPont cancelled Conoco's coal-to-methanol plans for reasons related to DuPont's major investment in gas-to-methanol facilities and its desire to orchestrate and protect its dominance in the methanol industry, as well as to internal DuPont considerations relating, among other things, to the allocation of development funds. Conoco would have gone forward with its plans had the acquisition not occurred. As a result of DuPont's cancellation of Conoco's plans, the industry is less competitive in the short term because

additional uses of, and demand for, methanol have not been created, and it will be less competitive in the long term because a new and substantial producer of methanol will not enter the market to challenge DuPont's dominance.

Had Conoco remained independent and gone forward with its plans, Conoco would have accounted for a major segment of overall demand in the methanol market and Alberta Gas would have sold substantial quantities of methanol to Conoco prior to the completion of Conoco's plant. In addition, DuPont's dominance of the methanol market would have been dramatically diminished so that Alberta Gas would have been able to compete more effectively for methanol sales.

The Issues Presented.

The first two issues presented by this petition are whether a panel of the Court of Appeals (Judge Becker dissenting) correctly applied this Court's decisions in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S. Ct. 484 (1986)[2], to deny Alberta Gas standing to seek damages and injunctive relief with respect to the acquisition of Conoco, which acquisition was assumed by the panel to be illegal under Section 7 of the Clayton Act. Judge Becker, in a strongly worded dissent, stated that the majority misapplied those decisions:

> "[T]he majority has reached the wrong result. . . . [T]he majority's result rests on a misconstruction of *Brunswick* and . . . *Cargill*. . . . " (App., A27–A29).

The basis for Judge Becker's conclusion is that both *Brunswick* and *Cargill* involved plaintiffs who claimed they were, or would

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[2] *Brunswick* involved a competitor's challenge to the acquisition of two of its competitors. *Cargill* involved a competitor's challenge to the merger of two of its competitors. See pages 11-13 and 22-25, respectively, for an analysis of *Brunswick* and *Cargill*.

be, injured by an *increase* in competition resulting from the acquisition being challenged, whereas Alberta Gas's alleged injury flows from the *decrease* in competition resulting from DuPont's acquisition of Conoco. In other words, the majority took *Brunswick* and *Cargill* completely out of context.

The third issue presented by this petition is whether a panel of the Court of Appeals (Judge Becker dissenting) erred in failing to consider the substantial future purchases of methanol which Conoco would have made had it not been acquired by DuPont when it held (for purposes of Alberta Gas's vertical claim which is unrelated to the standing issues derived from *Brunswick* and *Cargill*), that DuPont's acquisition of Conoco did not "substantially lessen competition" because the actual purchases of methanol made by Conoco after the acquisition were *de minimis*.

Overview.

Section 4 of the Clayton Act, 15 U.S.C. §15(a), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . . " Section 16 of the Act, 15 U.S.C. §26, provides that "any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . . " Alberta Gas has suffered and is threatened with injury from DuPont's illegal acquisition of Conoco and, on the face of Sections 4 and 16, has standing to seek relief.

In *Brunswick* and *Cargill*, this Court placed limitations on the relief authorized by Sections 4 and 16 in actions brought under Section 7. Those cases held that a competitor could not obtain relief if the basis for its claim of injury is that the challenged acquisition resulted in *more* competition for the competitor, because the antitrust laws were "designed to protect competition not competitors".

As stated by Judge Becker in the court below, the majority of the panel misconstrued the limitations found in *Brunswick*

and *Cargill*. The majority seized upon miscellaneous phrases and arguments found in those cases even though the factual underpinning of each is precisely the opposite of that found here. In both *Brunswick* and *Cargill*, this Court made clear that the decisions rested on one central fact: The injury for which the plaintiffs claimed relief resulted from an alleged *increase* in competition. In stark contrast, Alberta Gas seeks relief on the basis that DuPont's acquisition of Conoco *decreased* competition to the detriment of Alberta Gas.

The effect of the majority's decision to expand *Brunswick* and *Cargill*, if not overturned by this Court, will be to permit illegal mergers which have anticompetitive consequences to go virtually unchallenged. The Justice Department rarely challenges mergers and the customers of merged companies seldom have an interest in challenging them and seldom are in an economic position to do so. Certainly the ultimate consumer cannot challenge a merger. If the majority's decision is allowed to stand, therefore, illegal mergers will go unchallenged. Moreover, Congress's mandate to encourage litigants to act as private "attorneys general" will be frustrated.

With respect to Alberta Gas's vertical claim, Section 7 of the Clayton Act provides that an acquisition is illegal if it "may substantially lessen competition". By its terms and its consistent interpretation, Section 7 looks to the future. Under those circumstances, the majority erred in connection with Alberta Gas's vertical claim by refusing to consider the substantial purchases of methanol which Conoco would have made from Alberta Gas in the future had it not been acquired by DuPont.

Statement Of Facts.[3]

The Market.

The market at issue in this case is the production and sale of methanol. Methanol is a basic chemical used to manufacture

[3] This case was dismissed by the District Court on summary judgment and the majority opinion affirmed that dismissal. The majority opinion did not

(Footnote continued)

numerous important products such as formaldehyde (which is used to produce plywood, particle board and various plastics). At the time of the acquisition, DuPont used methanol directly or indirectly in products that accounted for more than 40% of its sales. In addition to its chemical uses, methanol can be used as a fuel both in its pure form and as an additive to fuel oil and gasoline. Methanol is widely viewed as the successor to gasoline in motor vehicles, to natural gas and fuel oil in utility generators and to petroleum in numerous chemical uses.

At the time of the acquisition, the methanol industry was highly concentrated. DuPont controlled 30% of the United States market. Two companies (including DuPont) controlled 50% of the market; four companies controlled 70% of the market; and nine companies controlled virtually 100% of the market.[4]

The Parties And The Acquisition.

Alberta Gas is a Canadian company which manufactures methanol in Canada and sells it in the United States market.

In 1981, DuPont acquired Conoco (in connection with a merger) in what was the largest acquisition in United States history. At the time of the acquisition, DuPont was the largest producer and seller of methanol and was the dominant force in the methanol industry. Conoco was a company with vast coal

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challenge the factual allegations made by Alberta Gas and those allegations must be taken as true.

The facts set forth earlier in this Petition are incorporated here by reference.

[4] The District Court in *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd per curiam*, 418 U.S. 906 (1974), summarized this Court's view of what constitutes a concentrated market:

> "The Supreme Court's characterization of highly concentrated markets is consistent with that employed by leading economists. Kaysen and Turner, for example, define a 'tight oligopoly' as one having a 'very small number (eight or fewer) firms supplying 50% of the market, with the largest firm having a 20% or higher share.' Kaysen & Turner, Antitrust Policy 72 (1959)." *Phillips Petroleum*, 367 F. Supp. at 1252.

reserves which had firm plans to build a plant costing almost $1 billion to make methanol from coal. Conoco's plans called for it to construct methanol producing facilities equal to 25% of the total 1983 United States capacity.

Conoco's Plans And DuPont's Cancellation Of Those Plans.

As an indispensable element in Conoco's plans to become a producer of methanol in the late 1980's, Conoco planned to purchase large quantities of methanol in order to develop additional demand and internal uses for methanol. That was necessary in order for Conoco to have established markets for its methanol when its production began. Conoco would have accounted for a major segment of the overall market demand. Just one of its contemplated purchases from Alberta Gas (for 100 million gallons per year) would have represented over 10% of the annual demand in the market.

After the acquisition, DuPont cancelled Conoco's plans in order to orchestrate and protect DuPont's dominance in the methanol industry and for internal reasons which did not relate to the merits of Conoco's plans. (DuPont had hundreds of millions of dollars invested in conventional gas-to-methanol facilities and was, and is, the largest producer of methanol in the United States.)[5] Inherent in the cancellation of Conoco's plans was the elimination of Conoco's ability to develop the additional demand referred to above. In fact, Conoco would have gone forward with its plans if it had not been acquired by DuPont.

Relief Sought By Alberta Gas.

Alberta Gas seeks the divestiture of Conoco from DuPont (or at least divestiture of the assets necessary to develop coal-based methanol)[6] and damages based on the substantial purchases of

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[5] Alberta Gas would, at trial, introduce expert economic testimony to the effect that DuPont's cancellation of Conoco's plans resulted in economic gains for DuPont at the expense of increased competition in the market.

[6] The Court of Appeals indicated that Alberta Gas is interested only in damages and not divestiture. That is not true. The court evidently based that

(Footnote continued)

methanol which Conoco would have made in the open market had Conoco not been prevented by DuPont from going forward with its plans to build a coal-to-methanol plant. In addition to that injury, Alberta Gas claims that it is threatened with injury by the acquisition's perpetuation and strengthening of DuPont's dominance in the production of methanol. Conoco's becoming a major methanol producer would have reduced the concentration in the methanol industry and would have diminished DuPont's dominance, including its demonstrated ability to lock customers into long term contracts penalizing them for dealing with a firm such as Alberta Gas. (See footnote 14 on pages 21-22). This would have enabled Alberta Gas and other producers to compete on the merits of their prices and service. (Alberta Gas is a particularly efficient producer of methanol because, among other things, it has access to low cost Canadian gas from which to manufacture methanol.) It is clear from the foregoing that the majority was simply incorrect when it stated:

> "Plaintiffs do not, and could not, complain about the ultimate effect of the merger—the prevention of a competitor's entry into the market." (App., A14 n.4).

DuPont's Acquisition Of Conoco Is Illegal.

Both the District Court and the Court of Appeals correctly assumed that DuPont's acquisition of Conoco has violated Section 7 of the Clayton Act in that it may substantially lessened competition in the methanol market. In fact, the acquisition violates the essence of what the antitrust laws are designed to accomplish. By acquiring Conoco, DuPont has prevented the large scale introduction of an innovative process for manufacturing

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view on Alberta Gas's electing not to seek a preliminary injunction. (App., A5, A30). Alberta Gas did not seek a preliminary injunction because, while it had general knowledge that Conoco was planning to become a methanol producer in competition with DuPont, it did not have sufficient documentation to obtain preliminary relief. It was not for some years after filing the complaint that Alberta Gas obtained the confidential documentary evidence which proved conclusively that Conoco had plans to start construction of a substantial coal-to-methanol plant.

methanol from coal, a resource which is found in virtually unlimited supply in this country. Methanol can, among other things, replace gasoline as a fuel for automobiles. The elimination of Conoco's plans to make methanol from coal, therefore, may deprive consumers of having a reliable, long term and inexpensive source of motor fuel. Certainly it will delay the time when methanol becomes available for that purpose. This is contrary to the best interests of consumers and represents the kind of problem a reduction in competition engenders.

History Of The Litigation.

On September 25, 1981, Alberta Gas filed its action against DuPont and Conoco under Section 7 of the Clayton Act in the District Court for the District of New Jersey. Jurisdiction was premised on Sections 4 and 16 of the Act. In May, 1986, Covington & Burling, counsel for defendants, requested an *in limine* ruling precluding Alberta Gas from introducing evidence of injury resulting from increases in the demand for methanol. On June 5, 1986, the District Court (Hon. Herbert J. Stern, who resigned from the bench on December 31, 1986), treated the *in limine* request as a motion for partial summary judgment and granted judgment for defendants. Thereafter, the District Court requested Covington & Burling to make a motion for summary judgment with respect to the remaining issues in the case. Defendants made their motion on July 1, 1986, and on September 3, 1986, the District Court granted that motion.

Alberta Gas appealed those decisions to the United States Court of Appeals for the Third Circuit.[7]

On August 17, 1987, a panel of the Third Circuit (Becker, J., dissenting) affirmed the District Court's dismissal of Alberta Gas's complaint. The Court of Appeals did not address Alberta

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[7] Alberta Gas also appealed the District Court's denial of Alberta Gas's motion for summary judgment on the issue of liability, which was based principally on this Court's decision in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), and its progeny.

Gas's motion for summary judgment although Judge Becker focused on one important element of the motion and stated that he would rule that the proof offered by Alberta Gas satisfied the requisite elements of the "actual potential competition" doctrine. (App., A41-A44). A petition for rehearing *in banc* was denied on September 10, 1987.

REASONS FOR GRANTING THE WRIT

The majority has completely misread and misapplied this Court's opinions in *Brunswick* and *Cargill*. As stated by Judge Becker,

> "[T]he majority has reached the wrong result. . . . [T]he majority's result rests on a misconstruction of *Brunswick* and . . . *Cargill* . . . . " (App., A27-A29).

The majority has taken peripheral phrases and arguments found in the opinions of those cases and applied them to the instant case even though the factual context in which those phrases and arguments were made demonstrates that they are inapplicable to this case. In addition, the majority has misapplied those phrases and arguments even assuming they are relevant to this case.

The majority's opinion is so confusing and deals with such a variety of irrelevant legal principles that courts faced with similar claims in the future will be misled and will arrive at incorrect results. As Judge Becker stated:

> "[T]he majority appears to have misconceived the plaintiff's claims. It responds to Alberta Gas's arguments with a variety of . . . irrelevant legal principles, so that I have had difficulty ascertaining the grounds on which the district court has been affirmed." (App., A27).

Adding to the confusion is the fact that the Courts of Appeals for the First and Sixth Circuits[8] decided cases which presented

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[8] *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354 (6th Cir. 1985), *cert. dismissed*, 469 U.S. 1200 (1985).

some of the same allegations as the instant case and held that competitors could challenge the merger of competitors in their industry. The Court of Appeals for the First Circuit, for example, stated:

> "We cannot conceive of a more appropriate plaintiff to challenge defendants' merger. Caribe is a direct competitor of defendants in the refined gasoline market. The gravamen of its complaint is that defendants' merger tends to lessen competition and to yield a greater concentration of firms within that market." *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 408 (1st Cir. 1985).

Those cases were decided prior to *Cargill* and, while it should be clear that those cases remain viable, the panel in the instant case obviously did not understand or respect them. In any event, the majority's decision is in direct conflict with those decisions of the First and Sixth Circuits.

In addition, competitors in an industry will be unwilling to incur the cost and make the time commitment required to challenge illegal and anticompetitive mergers which occur in their industries, since the majority appears to hold, contrary to this Court's statement in *Cargill* (107 S. Ct. at 495), that no company can, in fact, challenge the merger of its competitors. If such companies are precluded from challenging illegal mergers, many such mergers will go unchallenged since customers of a dominant firm in an industry rarely are in a position to challenge their suppliers' activities and the ultimate consumer rarely has the interest and often lacks standing to challenge such mergers. *See Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977). Therefore, Congress's desire to have private parties act as "attorneys general" will be frustrated.

POINT I

THE MAJORITY BELOW MISAPPLIED *BRUNSWICK* IN DENYING ALBERTA GAS THE DAMAGES ADMITTEDLY SUFFERED BY IT.

A. *The Facts And Holding Of* Brunswick.

In *Brunswick*, the Brunswick company, a large manufacturer of bowling equipment, acquired a number of bowling alleys which competed with the plaintiffs and which were on the verge of going out of business. The plaintiffs maintained that Brunswick's acquisition might substantially lessen competition in violation of Section 7 of the Clayton Act. They argued that Brunswick, a principal supplier of bowling equipment and a financially powerful company, would use the acquired bowling alleys to compete unfairly with the plaintiffs. The damages asserted by the plaintiffs, however, were not based on that prospect but rather on the fact that had Brunswick allowed the acquired bowling alleys to close, the plaintiffs' profits would have increased because they would have faced less competition.

The issue before this Court in *Brunswick* was whether the plaintiffs were entitled to damages suffered solely because their "competitors were continued in business, thereby denying [plaintiffs] an anticipated increase in market shares." 429 U.S. at 484. After stating that Congress condemned mergers "only when they may produce anticompetitive effects", this Court explained:

> "At base, respondents complain that *by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration*. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of *competition* not *competitors*,' *Brown Shoe Co. v. United States*, 370 U.S., at 320, 82 S. Ct., at 1521. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.
>
> * * *

> "We therefore hold that for plaintiffs to recover treble damages on account of §7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the *anticompetitive* effect either of the violation or of *anticompetitive* acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' " *Brunswick*, 429 U.S. at 488-89 (citation omitted; certain emphasis added).

Thus, *Brunswick* provides that a plaintiff challenging an illegal merger is entitled to damages if he alleges injury resulting from the anticompetitive effects of the merger.

B. *The Application Of* Brunswick *To The Instant Case.*

DuPont's acquisition of Conoco violates Section 7 because Conoco was (and would have been) a substantial purchaser of methanol and DuPont was the largest producer of methanol. DuPont's acquisition thus eliminated Conoco as a buyer of methanol in the open market (the "vertical" claim). In addition, DuPont's acquisition violates Section 7 because Conoco, which had firm plans to become a major producer of methanol, was eliminated as a future competitor of DuPont (the "horizontal" claim). In acquiring Conoco and cancelling its plans to produce methanol, DuPont also cancelled Conoco's plans to develop substantial new demand for methanol which was a prerequisite to constructing its plant.

The Court of Appeals held that *Brunswick* precludes Alberta Gas from proving damages (admittedly suffered by it) which relate to DuPont's cancellation of Conoco's plans to construct methanol plants and to develop additional markets for methanol, both as to Alberta Gas's vertical and horizontal claims. In so holding, the majority misinterpreted *Brunswick*.

1. Brunswick *Is Irrelevant To Alberta Gas's Vertical Claim.*

With respect to the vertical claim, the issue is whether the purchases of methanol which would have been made by Conoco in the open market (absent the acquisition) would have been sufficiently large that the elimination of Conoco as a purchaser "may substantially lessen competition". At trial, Alberta Gas would present testimony from a former Senior Commercial Representative of Conoco who was intimately involved in Conoco's plans to produce and market methanol, and uncontestable documentary evidence, to the effect that in the years before its coal-to-methanol plant came on stream, Conoco was required to expand existing markets and develop new markets for methanol. That fact is not in issue.

Conoco expressly planned to purchase hundreds of millions of gallons of methanol and looked to Alberta Gas as one of the principal sources of such purchases. Alberta Gas's damages, therefore, flow from the amount of methanol it was prevented from selling to Conoco as a result of its acquisition. As one factor in the calculation of the dollar amount of those damages, Alberta Gas would present expert testimony (based on the application of a recognized economic formula) that the effect of Conoco's additional purchases would have increased the price of methanol in the market and, therefore, the price of methanol purchased by Conoco.

It is clear that the *Brunswick* decision in no sense even relates to the kind of competitive injury or damages resulting from the vertical foreclosure of competitive sales opportunities. In fact, even the District Court recognized, with respect to the vertical case, that there is "no doubt" that an injury resulting from the foreclosure of Conoco's purchases "is an antitrust injury compensable under the *Brunswick* standard." (App., B10).

Section 7, by its terms, looks to the future. In determining damages under that Section and Section 4, therefore, it is mandatory that the amount of methanol Conoco would have purchased in the future (absent the acquisition) be included. (See Point III below). Alberta Gas's damage evidence relates directly to the amount of Conoco's future methanol purchases, *i.e.*, the

quantity of methanol which Conoco would have purchased and the price at which that methanol would have been purchased absent the acquisition. Neither the language nor the holding of *Brunswick* even arguably precludes such evidence, and the Court of Appeals' judgment, therefore, is patently incorrect with respect to the vertical case.

2. *The Majority Misapplied* Brunswick *With Respect To Alberta Gas's Horizontal Claim.*

With respect to the "horizontal" aspects of the case, the majority below made a classic mistake in its analysis of *Brunswick*. It cited as the holding of *Brunswick*, and attempted to apply, various phrases and arguments contained in this Court's decision but ignored the factual context in which the phrases and arguments were used. As a consequence of taking language out of context, the majority reached a conclusion never contemplated by this Court.

(a) *The Court Below Took* Brunswick *Out Of Context* – Brunswick *Is Not Applicable To The Facts Of This Case.*

The facts this Court faced in *Brunswick* differ materially from the facts of the instant case. In *Brunswick*, failing competitors were kept in the market; in the instant case, a healthy competitor that would have ended DuPont's dominance of the market was kept out of the market by DuPont. The damages claimed by the plaintiffs in *Brunswick* resulted from *more* competition rather than less – the *Brunswick* plaintiffs wanted to be compensated for damages they suffered because the defendants had created a more competitive environment in the plaintiffs' market.[9] That presented an obvious problem since the antitrust laws are designed to protect "competition not competitors". It was in that context that this Court held that a plaintiff's damages must reflect either the violation or the "anticompetitive acts made possible by the violation." 429 U.S. at 489.

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[9] This Court recognized the significance of this difference in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483 n.19 (1982), when it stated: "McCready's claim is quite unlike the claim asserted by the plaintiff in *Brunswick* for she does not seek to label increased competition as a harm to her."

In *Brunswick*, the act which was illegal was the acquisition of small bowling alleys by a giant bowling supply company which might, in the long term, result in a lessening of competition in the bowling alley business because of "predatory" acts which might be committed by the acquiring company. 429 U.S. at 490. This Court recognized the plaintiffs' right to seek injunctive relief because of the potential anticompetitive effect of the acquisitions (429 U.S. at 491), but the damages the plaintiffs were seeking bore no relation to that potential effect. The immediate effect of the acquisitions was to keep the acquired bowling alleys in business, thus creating more competition for the plaintiffs. In other words, the claimed injury to the plaintiffs resulted solely from an increase in competition which was totally unrelated either to any act which made Brunswick's acquisitions anticompetitive or to any other anticompetitive act "made possible" by that act. In fact, this Court expressly noted that the plaintiffs were not claiming damages based on any anticompetitive conduct engaged in by the defendants. 429 U.S. at 490.

The foregoing is in sharp contrast to the facts of the instant action. When DuPont acquired Conoco and cancelled its plans to build a coal-to-methanol plant, DuPont violated Section 7 because DuPont eliminated Conoco as a substantial methanol competitor. That was, by definition, anticompetitive. The elimination of Conoco as a competitor automatically eliminated the need for, and the ability to accomplish, an increase in demand for methanol as a fuel. That also was anticompetitive in that competition for the sale of hundreds of millions of gallons of additional methanol was eliminated.

(b) *Even If The Language Of* Brunswick *Is Taken Out Of Context And Applied To This Case, It Supports The Damages Alleged.*

The language of *Brunswick*, even if it is improperly taken out of context and applied to this case, does not preclude Alberta Gas from proving damages based on Conoco's plans to build its coal-to-methanol plant and develop new demand for methanol.

(i) *Alberta Gas's Damages, In The Circumstances Of This Case, May Be Based On An Increase In Demand Which Raises The Price Of Methanol.*

Judge Becker correctly observed that because part of Alberta Gas's claim for damages was based on the fact that it would have benefitted from a price rise rather than a price fall, the majority concluded that Alberta Gas was complaining about procompetitive activity. (App., A31). The majority based that conclusion on the assumption that lower prices invariably are a sign of more competition and that rising prices are always a sign of less competition.[10] Judge Becker recognized that "[t]his reasoning is simplistic and incorrect." (App., A30). He further observed:

> "DuPont argues here that Alberta Gas is really only complaining about the fact that the price for methanol did not rise, and that such harm cannot constitute antitrust injury. While it is true that Alberta Gas is complaining about lost profits, the profits were allegedly lost not because DuPont preserved or increased competition — as the defendant in *Brunswick* was alleged to have done — but because DuPont *eliminated* competition. The things Conoco allegedly would have done — investing in a new plant and stimulating demand to ensure that there would be a market for that plant's product — are procompetitive, socially beneficial activities. The prevention of those activities causes a decrease in social welfare. Alberta Gas was allegedly injured by that decrease in social welfare.
>
> "Thus the majority is simply—and crucially—incorrect when it states, slip op. at 19, that '[f]rom the consumer's standpoint, the development that

[10] Contrary to the statement of the majority, the long term effect on consumers of Conoco establishing an independent coal-to-methanol plant, in addition to enhancing their access to more economical alternative fuels, would be a reduction in the price of methanol (from what it would otherwise be) even though in the short term the price would go up.

> Alberta anticipated and the basis for its claim — an increase in methanol price — would prove distinctly disadvantageous.' A rise in price is harmful to consumers if it represents only movement along an unchanged demand curve — a movement from point A to point B on the graph below.[11] But here the rise in price would have been caused by a shift to the right of the demand curve — a movement from point A to point C. This shift in the demand curve indicates that the commodity sold has become more useful to consumers. Such a change is indeed socially beneficial, and therefore procompetitive, not anticompetitive and harmful." (App., A32-A33; footnote omitted).

Moreover, Judge Becker, recognizing that Alberta Gas's damages are not simply a factor of price changes, also correctly pointed out (App., A33 n.5) that Alberta Gas would have experienced additional profits by virtue of increased sales even if the price of methanol did not rise.

(ii) *Alberta Gas Is Not Seeking "Windfall Profits".*

The majority reads *Brunswick* as requiring the characterization of Alberta Gas's claim as seeking "windfall profits". (App., A18). But as Judge Becker stated, "the majority is wrong in characterizing plaintiff's complaint as an attempt to recoup 'windfall profits.' " (App., A34). As explained by Judge Becker, windfall profits are "the benefits that one competitor in a market would have received if another competitor engaged in

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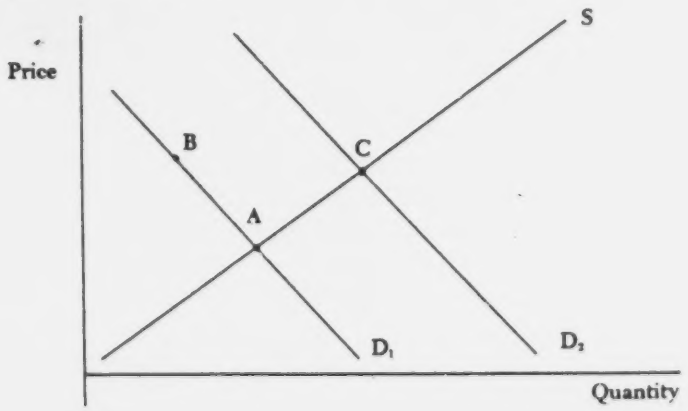
[11] The graph was as follows:



*anti*competitive conduct which raised the market price." (App., A34—A35). Judge Becker distinguished that situation from the instant case where "the allegation is that the price would have risen as a result of *pro*competitive activity. A benefit from increased competition is not a windfall; it is exactly the kind of benefit which the antitrust laws were intended to preserve. This is no less true simply because one of the beneficiaries of this competition is a competitor." (App., A35).

(iii) *The Effect On Alberta Gas If The Acquisition of Conoco Were Made By A Company (Other Than DuPont) Which Cancelled Conoco's Plans Is Irrelevant.*

The majority purported to apply *Brunswick* to find a lack of antitrust injury based on the fact that Conoco's plans might have been terminated (with the same effect on Alberta Gas) had Conoco been legally acquired by a company not involved in the methanol business. The simple fact is that in one case the damages result from legal business activity and in the other from anticompetitive activity which is illegal. In addition, Judge Becker observed:

> "I believe the majority's argument is wrong because it misstates the manner in which the law uses intent to explain the significance of anticompetitive activity. If another company had bought Conoco and terminated the plans, it would have done so because the plans were unwise. DuPont claims that that is why it, too, terminated the plans. But plaintiff claims that DuPont eliminated the plans to protect DuPont's market power in the methanol market. If that is why DuPont did what it did, then another purchaser probably would not have terminated the investment plans. DuPont's alleged intention indicates the anticompetitive effect of its actions.

* * *

". . . The fact that no anticompetitive results would have ensued if Conoco had been bought by General Foods is irrelevant, and does not provide a basis for dismissal for lack of standing in view of Alberta Gas's allegations about Dupont's intentions." (App., A35-A36; footnote omitted).

(iv) *The Majority Ignored The Operative Language of* Brunswick.

The majority throughout its opinion attempts to apply the law of *Brunswick* using the formulation that the damages alleged must "flow from that which makes defendant's acts unlawful". While it does quote the more extensive elaboration of that standard contained in this Court's opinion (App., All), it ignores that elaboration in making its various findings. This Court stated in *Brunswick* that the harm should reflect the anticompetitive effect "either of the violation *or of anticompetitive acts made possible by the violation*". (429 U.S. at 489; emphasis added).[12] In fact, the damages suffered by Alberta Gas did flow directly from the violation, *i.e.*, the reason why the DuPont/Conoco merger is illegal. DuPont's elimination of a new producer of methanol in an oligopolistic market and its elimination of such producer's demand-creation activities directly affect Alberta Gas and flow directly from that which makes the merger illegal. It should be beyond debate, however, that Alberta Gas's alleged damages flow from anticompetitive acts which were "made possible" by the illegal acquisition. Those acts consist of cancelling Conoco's plans to become a major competitor in methanol production and to purchase huge quantities of methanol prior to the completion of its coal-to-methanol plant.

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[12] In *Blue Shield* (457 U.S. at 482), this Court quoted the above language in explaining that standing under "Brunswick is not so limiting" as to embrace solely injuries that "reflect the anticompetitive effect" of the violation.

POINT II

THE MAJORITY MISAPPLIED *CARGILL* AND IGNORED ITS RELEVANCE IN DENYING ALBERTA GAS STANDING TO OBTAIN INJUNCTIVE RELIEF

The majority denied Alberta Gas the right to seek injunctive relief on the theory that since it was not entitled to damages under *Brunswick*, it was not entitled to an injunction. The majority ignored Alberta Gas's claim that DuPont's acquisition of Conoco enhanced DuPont's dominance in the methanol market which, in turn, will lessen competition in that market to the detriment of Alberta Gas.[13]

A. *The Nature Of The Illegality Of DuPont's Acquisition Of Conoco.*

DuPont's acquisition of Conoco is presumed to be illegal under Section 7 of the Clayton Act because it will substantially lessen competition in the methanol market. If Conoco were permitted to become an independent major methanol producer, the concentration in the methanol industry would be reduced and DuPont's dominance in the market would be diminished. Increased competition would enable Alberta Gas and other producers to compete on the merits of their prices and service. DuPont would no longer be able to prevent its methanol customers from dealing with Alberta Gas through the use of threat and intimidation.[14] In short, the methanol market would be less

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[13] *Brunswick* deals with a plaintiff's right to damages under Section 4 of the Clayton Act; *Cargill* deals with the right to injunctive relief under Section 16. Clearly, if Alberta Gas is entitled to damages under *Brunswick*, it is entitled to injunctive relief under *Cargill*. Even if Alberta Gas were not entitled to damages under *Brunswick*, however, it would still be entitled to injunctive relief under *Cargill* in order to eliminate the threat of injury raised by DuPont's enhancement of its dominance in the methanol industry.

[14] For example, prior to the acquisition, DuPont submitted a proposed contract to Conoco pursuant to which Conoco was to purchase methanol

(Footnote Continued)

concentrated and more competitive. In addition, as stated above, DuPont's acquisition of Conoco substantially lessens competition (and is illegal) because it eliminated the substantial additional demand for methanol which would have occurred had the acquisition not occurred.

B. Cargill *And Its Application To The Instant Case.*

In *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S. Ct. 484 (1986), the plaintiff challenged the merger of two of its competitors in the meat packing industry, alleging that it would be at a competitive disadvantage as a result of the merger. (107 S. Ct. at 491). Upon close examination, this Court determined that the plaintiff's only alleged source of injury was that after the merger the merged firm "would lower its prices to some level at or slightly above its costs" and that the plaintiff would have to lower its prices to meet that competition.[15] This Court held that such "loss of profits in such circumstances" did not constitute antitrust injury because such losses were merely the result of increased competition in the market which was not compensable under *Brunswick*. 107 S. Ct. at 491-93.

This Court rejected the plaintiff's argument in *Cargill* that its alleged losses differed from the losses in *Brunswick* in that the alleged losses resulted from an increase rather than a

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from DuPont. The contract contained a provision which provided that if Conoco purchased methanol from a competitor in one year, "DuPont reserves the right to reduce quantities for all years under the contract." A Conoco attorney prepared a memorandum which pointed out that that provision was unacceptable in that it "severely limits our use of the Competitive Clause . . . I suggest that the last six words of the competitive offer clause be deleted." DuPont refused to accede to the attorney's point and forced Conoco to agree to its terms. Similarly, DuPont's counsel admitted in a letter to the International Trade Commission that DuPont's supply contracts have sought to bar its customers from seeking lower priced methanol from non-domestic producers (*i.e.*, Alberta Gas). Since DuPont was the largest supplier of methanol, it had the power to insist on provisions which, in essence, prevented its customers from purchasing methanol from other producers.

[15] Needless to say, Alberta Gas has never maintained that it was injured by DuPont lowering prices.

continuation of competition. This Court stated that the correct distinction lies in the difference between competitive activity and anticompetitive activity, *i.e.* "practices forbidden by the antitrust laws":

> "[Plaintiff] argues that the losses in *Brunswick* can be distinguished from the losses alleged here, since the latter will result from an increase, rather than from a mere continuation, of competition . . . We find [plaintiff's] proposed construction of § 7 too broad, for reasons that *Brunswick* illustrates. *Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as [defendants] claim, vigorous competition."[16] (107 S. Ct. at 492).

The facts and underlying reasoning in *Cargill* bear no resemblance to the instant case. In *Cargill* the relevant "markets [were] highly competitive . . . [T]he current markets [were] a product of two decades of intense competition . . ." 107 S. Ct. at 487. The methanol industry, on the other hand, was highly concentrated and dominated by DuPont and one other company which, together, controlled 50% of the market. In *Cargill*, the plaintiff's alleged injury was based on an increase in competition. In contrast, Alberta Gas has alleged that DuPont's acquisition of Conoco has lessened, and will lessen, competition. That lessening of competition is manifested in the elimination of a substantial increase in the demand for methanol and in the enhancement of DuPont's dominance in the market.

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[16] As an example of anticompetitive activity "forbidden by the antitrust laws" this Court cited "predatory pricing", but pointed out that the plaintiff in *Cargill* "made no allegation that [the defendant] would act with predatory intent after the merger. . . . " *Id.* at 493.

In *Cargill*, this Court stated that cases such as *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354 (6th Cir. 1985), *cert. dismissed*, 469 U.S. 1200 (1985), presented sufficient allegations of "injury of the type the antitrust laws were designed to prevent" to support a competitor's standing to challenge a merger of its competitors. 104 S. Ct. at 490 n.7. The allegations of injury in *Christian Schmidt* were essentially the same as those alleged by Alberta Gas with respect to DuPont's continued dominance in the methanol market. The plaintiff in *Christian Schmidt* argued that if " 'competition between Pabst and Heileman is eliminated, then the combined firm would be able to target its competitive efforts on Schmidt and other small brewers' . . . [T]he economic power of the merged corporation would induce distributors to drop the smaller brewers as customers. This power is gained not from the marketplace, but from their dominance in it." *Id.* at 1357.

In *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987), the district court applied *Cargill* to enjoin a dominant firm's acquisition of a competitor where the competitor/plaintiff alleged that the merger would impair its ability to enter new markets and develop new business. Judge Fullam stated:

> "It is not surprising that one competitor should be accorded standing to challenge another competitor's acquisition that reduces competition in a shared market. *See, Cargill*, 107 S. Ct. at 495, *approving on this point*, 761 F.2d 570, 577 (10th Cir. 1985) (collecting cases granting standing based on such allegations). While in some cases competing companies all may benefit by increasing oligopolistic character of a market, in other cases competitors — with specialized knowledge of their market — may recognize that an acquisition will enable the acquiring company to harm competition by harming the remaining competitors; with this special knowledge that enables rapid action, together with their access to resources needed to prosecute an antitrust action, competitor-plaintiffs well may assure that 'a plaintiff adequately represents the interests of "victims" of the antitrust

> violation' and that 'in fashioning relief [judges] appropriately address and remedy the actual violation rather than simply correct an incidental injury.' *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-11 (3d Cir. 1980). In all cases, of course, plaintiffs must prove that they face threatened antitrust injury, but evaluation of this proof is best separated from the standing analysis, and deferred for consideration as part of the merits of the case and as a factor determining the adequacy of plaintiffs' remedy at law. *Accord Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570, 574 n. 2 (10th Cir. 1985), *rev'd on other grounds*, ____ U.S. ____, 107 S. Ct. 484, 93 L.Ed.2d 427 (1986)." *Id.* at 1256.

In sum, the factual setting of *Cargill* is completely different from that found in the instant case. The plaintiff in *Cargill* (as the plaintiffs in *Brunswick*) sought relief based on alleged injury which resulted from increased competition for the plaintiffs (which, in turn, resulted in lesser profits for the plaintiffs). That is the opposite of the instant case, in which Alberta Gas is seeking damages and injunctive relief because DuPont's acquisition of Conoco has decreased, and will decrease, competition in a manner directly harmful to Alberta Gas.

C. *The Effect Of The Court Of Appeals' Decision.*

The effect of the Court of Appeals' decision, if it is not overturned, would be to deny a competitor standing to seek injunctive relief from the illegal merger of two of its competitors. As a practical matter, no competitor could ever meet the standard inherent in that decision.[17] Yet, that is directly contrary to what this Court stated in *Cargill*. This Court expressly rejected the suggestion of the Justice Department to adopt a *per se* rule "denying competitors standing to challenge acquisitions." 107 S. Ct. 484, 495. It refused to accept the Department's argument that such

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[17] Who, for example, could establish that if one of the parties to an illegal merger of competitors in a concentrated industry had been a company in a different industry, the merger would still be illegal?

a rule should be established because an abusive practice may occur "only infrequently." *Id.* As Judge Becker stated:

> "The majority here has held squarely that Alberta Gas lacks standing because the actions it challenges would only rarely be anticompetitive. The Supreme Court has just told us [in *Cargill*] that is wrong." (App., A38).

POINT III

IN CONNECTION WITH ALBERTA GAS'S VERTICAL CLAIM, THE MAJORITY ERRED IN DISREGARDING CONOCO'S PLANNED PURCHASES OF METHANOL

Alberta Gas alleges that DuPont's acquisition of Conoco eliminated Conoco as a future purchaser of methanol. In connection with that claim, Alberta Gas alleges that if DuPont had not acquired Conoco, Conoco would have gone forward with its plans to construct a coal-to-methanol plant and, prior to the completion of that plant, would have purchased substantial quantities of methanol from Alberta Gas and others in the open market.

The majority totally ignored Alberta Gas's claim concerning Conoco's future purchases even though it assumed as a factual matter that Conoco would have made those purchases. It held that the amount of methanol sales actually denied to Alberta Gas was *de minimis*. (App., A22–A25). Judge Becker specifically discussed the majority's error:

> "I . . . believe the majority has completely misconstrued the plaintiff's 'vertical' claim for damages. The plaintiff primarily complains about the sales it would have made to Conoco if Conoco had gone through with its plans to build a large network of methanol dealers.
>
> * * *

"With respect, the majority has missed the point. Plaintiff is not complaining about the fact that once Conoco's coal gasification plans were terminated, Conoco purchased only a bit of methanol on the open market and that Alberta Gas got none of *that* business. Plaintiff's point is that *if DuPont had not purchased Conoco and terminated the coal gasification plans*, Conoco would have bought much more, and that Alberta Gas would have sold Conoco much of that increment.

* * *

" . . . Alberta Gas is not complaining simply that demand which it could have filled is now being filled by DuPont. Alberta Gas is complaining that demand which it could have filled now does not exist, because DuPont terminated the project which would have given rise to the demand. The theory of vertical foreclosure says nothing one way or the other about that argument. It certainly does not hold that the elimination of such new demand has no anticompetitive consequences." (App., A38-A39; italics in original).

Section 7, by its terms, looks to the future in that the issue under that Section is whether an acquisition "may substantially lessen competition." *See, Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967) ("Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency"); *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 (1962), citing S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5, U.S. Code Cong. and Adm. News, 1950 p. 4296. In determining damages under that Section, therefore, it is necessary that the amount of methanol Conoco would have purchased in the future (absent the acquisition) be included.[18]

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[18] In *United States v. Standard Oil Co. (New Jersey)*, 253 F. Supp. 196 (D.N.J. 1966), the court, in a well written opinion, applied this Court's requirement that the probable effect of a vertical merger must be measured in terms of

(Footnote Continued)

Although the foregoing appears crystal clear, this Court has not specifically addressed the issue of future purchases by an acquired company which, after the acquisition, were not actually made because the acquiring company cancelled the plans of the acquired company. This is an important issue which gives this Court the opportunity to uphold the application of Section 7 to post-acquisition activities which are anticompetitive and which result directly from the acquisition.

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the future as well as present foreclosure:

> "It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.' See Brown Shoe Co., *supra*. . . . " 253 F. Supp. at 225 (quoting *United States v. Philadelphia National Bank*, 374 U.S. at 362).

With respect to determining the amount of foreclosure, the court in *Standard Oil* focused not only on the relevant purchases in the year the acquisition occurred, but also on the purchases that would have occurred five years after the acquisition. 253 F. Supp. at 225-26.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Dated: October 20, 1987

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5662

ALBERTA GAS CHEMICALS LIMITED and
ALBERTA GAS CHEMICALS, INCORPORATED,
Appellants

v.

E.I. DU PONT DE NEMOURS AND COMPANY, DU
PONT HOLDINGS, INC., and CONOCO INC.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

(D.C. Civil No. 81-3024)

Argued February 25, 1987

Before: WEIS, BECKER, and HUNTER,
Circuit Judges.

Filed August 17, 1987

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

In this antitrust suit a methanol producer challenges a competitor's acquisition of another corporation. The merger led to cancellation of the acquired company's plans to produce methanol by a new process, preceded by large scale purchases to stimulate the market before beginning production. We conclude that the plaintiffs' alleged loss of anticipated sales resulting from that expected increase of market activity does not constitute antitrust injury. We determine further that the plaintiffs' collateral loss of sales to the acquired company in the circumstances amounts to only a de minimis foreclosure, and does not constitute antitrust injury. Consequently, we will affirm the district court's entry of summary judgment in favor of defendant.

In 1981, E. I. Du Pont de Nemours and Company acquired Conoco Inc., in a transaction of approximately 7.8 billion dollars. Plaintiffs contend that the merger violated § 7 of the Clayton Act, 15 U.S.C. § 18, because it "may substantially lessen competition" in the United States market for methanol. Plaintiffs seek an order for divestiture as well as money damages of 98.5 million Canadian

dollars for lost profits and interest and 153 million Canadian dollars for reduced value of the plaintiffs' business.

Although Du Pont and Conoco produce a variety of products, this litigation focuses on the methanol-producing and methanol-consuming aspects of their operations. Methanol is a chemical used in the manufacture of such products as formaldehyde, plywood, particle board, various plastics, and many others. Methanol can also be used as a fuel both in its pure form and as an additive to gasoline. It is viewed as a successor to gasoline in motor vehicles, to natural gas and petroleum in utility generators, and to petroleum in various chemical uses.

Plaintiffs are Alberta Gas Chemicals, Ltd., a Canadian natural gas producer, and its New Jersey subsidiary, Alberta Gas Chemicals, Inc. (collectively "Alberta"). Alberta produces methanol from its natural gas holdings in Canada and boasts the largest source of the product in that country. In the highly concentrated United States "merchant market," that is, the market for methanol not used by the producing company for internal manufacturing, Alberta's sales accounted for about 7% in 1981.

Defendant Du Pont was the largest producer of methanol in the United States in 1981, recording sales of about 30% of the merchant market. In that year, Du Pont devoted about half of its production to internal operations. Du Pont and the second largest producer together controlled about 50% of the market, and the four largest companies accounted for more than 70%.

At the time of the acquisition, Conoco was an international energy company owning the largest coal reserves in the United States. It did not produce methanol, but in 1980 purchased roughly nine million gallons for use in its chemical and plastic manufacturing plants in New Jersey and Louisiana. Its

purchases represented approximately 1.8% of total merchant market sales in the United States.

Although methanol is generally manufactured from natural gas, studies have demonstrated the potential for using coal as a source through a gasification and liquefaction process. During the 1970s and early 1980s when crude oil prices rose rapidly, projects that experimented with coal to produce synthetic fuels grew commercially attractive. With governmental encouragement, many corporations explored coal gasification and, by mid-1981, at least sixteen coal-to-methanol projects were active.

Before the merger, Conoco had been studying plans to construct a large coal gasification facility in the United States. Among other uses, the company considered blending methanol with gasoline to produce gasohol, a fuel for motor vehicles that Conoco would market through its existing service stations, particularly on the west coast.

After the merger, Conoco cancelled the coal gasification project. The company also sold its chemical plant in Louisiana and dismantled the one in New Jersey. By 1984, Conoco's methanol purchases were comparatively minimal.

Because of the lead time necessary for construction, Conoco's first methanol plant was not likely to have begun operations until the late 1980s. In order to have a market in place when manufacture began, Alberta asserts that Conoco planned to purchase large quantities of methanol from a number of producers in the interim. Conoco would then sell this methanol on the merchant market to stimulate additional demand.

Alberta estimates that Conoco would have purchased at least one hundred million gallons of methanol per year in the interim before its own

production facilities became operational. Alberta would have supplied some of this quantity, it says, and to that extent would benefit directly. It would profit indirectly through the increased price for methanol brought about by the large demand created by Conoco's purchases. These elements make up Alberta's first or "demand creation" claim.

Alberta's second claim is based on the premise that it would have sold methanol to Conoco for its chemical and plastic plants in New Jersey and Louisiana. After the merger, Conoco filled some of its needs through Du Pont and other companies, but none through Alberta. Alberta claims damages for a loss of sales to Conoco which, it is alleged, resulted from the merger.

After the acquisition, Du Pont temporarily closed one of its two methanol-producing plants and, although it no longer predominates in the "merchant market," still possesses substantial market power. The price of methanol has declined substantially since the early 1980s, and there is now an oversupply in the world market. Du Pont insists that Conoco did not proceed with coal gasification plans because of the falling price of oil and observes that other companies also abandoned their projects for the same reason.

Conoco's consumption of methanol fell after the merger to about 400,000 gallons in 1985, none of which Du Pont supplied. Conoco had purchased some methanol from Alberta in the late 1970s, but was not a customer of plaintiffs at the time of Du Pont's acquisition.

Alberta filed suit on September 25, 1981, in the United States District Court for the District of New Jersey. The complaint asked for equitable relief, but Alberta did not seek a preliminary injunction. The merger became effective on September 30, 1981. After the parties had conducted extensive discovery, the district court granted summary judgment in favor of

Du Pont on Alberta's horizontal or "demand creation" claim and, at a later date, on the "vertical" count as well.

The court assumed for purposes of summary judgment that Du Pont's acquisition of Conoco violated § 7 of the Clayton Act[1] and that Alberta had suffered the losses it claimed. In addition, the court also accepted Alberta's theory that potential competition between Du Pont and Conoco had been or would be eliminated because of cancellation of the coal gasification project. Rejecting Alberta's arguments, the district court stated that the absence of a projected increase in industry demand was not identical to a lessening of competition. There being no antitrust injury in the view of the court, it denied Alberta's demand creation claim.

The district court distinguished Alberta's second or "vertical" claim -- that for losses of sales to Conoco's chemical plants. Relying on *Brown Shoe Co. v. United States*, 370 U.S. 284, 328 (1962), the court reasoned that foreclosing competitors from a segment of the market would make defendant liable for losses traceable to that action. Because Conoco had ceased its chemical manufacturing operations by 1984, however,

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[1]Section 7 provides in pertinent part:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another person engaged also in commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18.

the court ruled that Alberta could not establish any losses after that point.

In addition, the court observed that Alberta had not submitted any breakdown of the losses suffered between the acquisition in 1981 and Conoco's withdrawal from the plastic and chemical manufacturing fields in 1984. Based on this gap in proof, the court concluded that Alberta had failed to meet its burden on damages. Moreover, the court stated that its decision was compelled because "even before the merger Conoco had no plans to purchase methanol from Alberta."

Finally, the court denied Alberta's claim for an injunction. The court noted that because the antitrust injury requirement applies to claims for equitable relief, Alberta's failure to demonstrate antitrust injury in its damage claims was fatal to its prayer for divestiture.

On appeal, Alberta contends that it would prove its vertical claim at trial by showing prospects of sales to Conoco and argues that summary judgment was inappropriate to resolve this issue of material fact. Alberta asserts, in addition, that the district court erred in evaluating the vertical claim by relying on Du Pont's post-acquisition activity. That conduct, Alberta says, is self-serving and is merely temporary forbearance limited to the duration of the current litigation.

As to the demand creation claim, Alberta argues that in failing to find antitrust injury, the district court erred because it did not recognize that the damages flow directly from "either . . . the [antitrust] violation or . . . anticompetitive [acts] made possible by the violation." Brief for appellants at 27 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

I.

Summary judgment can be granted only if no genuine issue of material fact exists. Fed. R. Civ. P. 56(c): *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). An issue is "genuine" only if the evidence is such that a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 2511. On review of a grant of summary judgment, this court applies the same test that the district court should have adopted. *Marek v. Marpan Two, Inc.*, No. 86-1493, slip op. (3d Cir. May 1, 1987).

II.

It is important to place this litigation in its proper setting. The district court assumed, *arguendo*, that § 7 had been violated. If the government were prosecuting, sanctions against defendant should follow. Otherwise, public policy against improper mergers as expressed in the antitrust laws would not be realized.[2]

This is not, however, a suit instituted by the government for the benefit of society as a whole, but a claim brought by a private litigant -- a competitor of defendant. To supplement enforcement of the antitrust

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[2]The Justice Department did examine the merger and, with the exception of a joint venture in an area not pertaining to methanol, did approve the acquisition of Conoco on July 30, 1981. The joint venture objection was resolved by a complaint and stipulated final judgment filed in the United States District Court for the District of Columbia on August 4, 1981, Docket No. 81-1837.

laws. Congress has created private causes of action to recover treble damages and obtain equitable relief. *See* 15 U.S.C. § § 15, 26. This additional avenue of enforcement, however, is not open to all who might be interested in punishing the wrongdoer or who might have suffered some peripheral loss. In an effort to keep private enforcement within reasonable bounds, the courts have imposed limitations designed to discourage plaintiffs other than those most apt to carry out the purposes of the statutes.

Courts have carefully scrutinized enforcement efforts by competitors because their interests are not necessarily congruent with the consumer's stake in competition. Mergers that promote efficiency and lower prices in the marketplace, for example, may cause economic loss to competitors.

Conduct that harms competitors may benefit consumers - a result the antitrust laws were not intended to penalize. "When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust." *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986); *see Cargill, Inc. v. Monfort of Colo., Inc.*, 107 S. Ct. 484, 493 (1986) (competitor's loss of profits due to increased price competition following a merger does not constitute a threat of antitrust injury)[3]; *see also* Hovenkamp, *Merger Actions for Damages*, 35 Hastings L. Rev. 937, 956 (1984) (private plaintiffs' injuries are as likely to be caused by the efficiency aspects of mergers as by their market power effects); Baumol &

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[3]For collections of cases and commentary, *see* Note, *Horizontal Mergers, Competitors, and Antitrust Standing Under Section 16 of the Clayton Act: Fruitless Searches for Antitrust Injury*, 70 Minn. L. Rev. 931 (1986); Note, *Standing to Sue for Clayton Act Injunctions: Chrysler -- Injured Party or Disgruntled Competitor?*, 31 Wayne L. Rev. 1275, 1283 (1985).

Ordover, *Use Of Antitrust To Subvert Competition*, 28 J. L. & Econ. 247 (1985).

One restriction on private enforcement the courts have imposed is the doctrine of standing. A malleable concept not easily defined, antitrust standing has been construed in a variety of ways and settings. The struggle to articulate a precise formulation is a continuing one because success has proved elusive.

At times, the label "standing" has caused confusion when used in the antitrust context as opposed to the constitutional sense. The Supreme Court has noted that "[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983).

As the Court said, it is not enough that the complaint alleges "a causal connection between an antitrust violation and harm to the [plaintiff]. . . . [T]he mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry." *Id.* at 537. Among the factors that must be weighed in determining antitrust standing are the directness or indirectness of the injury, the court's ability to keep trial of the claim within the judicially manageable limits, and the nature of the injury (*i.e.*, is it of the type that the antitrust laws were meant to prevent). *Id* at 538-45. *See Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 964-65 (3d Cir.), *cert. denied*, 104 S. Ct. 1278 (1983). *See also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972).

The "nature of the injury" factor determines whether the plaintiff has suffered "antitrust-injury."

This term was the focus of discussion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477. There, the Court stated that to recover treble damages for a § 7 violation, plaintiffs must prove more than harm causally linked to an illegal presence in the market. Rather, they must establish antitrust injury -- "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 489. The harm "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Id.* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)); *see also Blue Shield of Va. v. McCready*, 457 U.S. 465, 482-83 (1982); *Associated Gen. Contractors*, 459 U.S. at 538-40.

Expanding on that notion, in *Cargill*, the Court held that a private plaintiff seeking an injunction under § 16 of the Clayton Act, 15 U.S.C. § 26, must show a threat of antitrust injury. *See also Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa.*, 815 F.2d 270, 275 (3d Cir. 1987); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-11 (3d Cir. 1980).

A showing of antitrust injury is necessary but not always sufficient to establish antitrust standing. A party may have suffered antitrust injury yet not be considered a proper plaintiff for other reasons. *See Cargill*, 107 S. Ct. at 489-90 & nn.5, 6. It has been suggested that although standing is closely related to antitrust injury, the two concepts are distinct. Once antitrust injury has been demonstrated by a causal relationship between the harm and the challenged aspect of the alleged violation, standing analysis is employed to search for the most effective plaintiff from among those who have suffered loss. *See Cargill*, 107

S. Ct. at 490 n.6; *Schoenkopf*, 637 F.2d at 210; *see also* Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1484 (1985). However, in the sense that plaintiffs who sustain no antitrust injury may not recover, they may be loosely said to lack standing. Some courts and commentators thus have treated *Brunswick* as a standing case, although its concerns actually centered on antitrust injury.

Cargill emphasized the necessity for scrutinizing the antitrust injury factor. There, the Court wrote that the antitrust laws protect business against "the loss of profits from practices forbidden by the antitrust laws. . . . [C]ompetition for increased market share[] is not activity forbidden by the antitrust laws." 107 S. Ct. at 492. In short, Clayton Act deterrence through compensatory provisions is aimed toward the directly harmful effects of an antitrust transgression. The statutory sanctions do not constitute a broad restitutionary scheme for injuries not closely related to the violation but caused by other effects, desirable or not, of the illegal conduct. *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 372 (3d Cir. 1985); *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 447-48 (3d Cir.), *cert. denied*, 439 U.S. 915 (1978). Mindful that antitrust law aims to protect competition, not competitors, we must analyze the antitrust injury question from the viewpoint of the consumer. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

The issue before us is whether Alberta has asserted losses which may properly be called antitrust injury. Concerns about "standing" in this case must be read in that light.

III.

As noted above, Alberta's first, or horizontal, claim seeks damages for lost sales allegedly caused by the termination of Conoco's plans to produce and build demand for methanol as a fuel. The acquisition, resulting in cancellation of the coal gasification project, according to Alberta, violated § 7 because Du Pont eliminated Conoco as a substantial methanol producing competitor. That action also ended Conoco's plans to spur demand for methanol as fuel. As a result, Alberta asserts that it lost sales and profits when "competition for the sale of hundreds of millions of gallons of additional methanol [to Conoco to build interim demand] was eliminated." Brief for appellants at 28.

The district court found that injury from this "demand creation" claim "bears absolutely no relationship to the aspect of the merger which is said to make it illegal under § 7, that is, that it lessens competition in the methanol industry." The court noted that "Alberta Gas alleges no damages as a result of the elimination of potential competition between Du Pont and Conoco. Instead, the damages alleged are purely the result of the failure of demand to rise. . . . No damages can possibly be awarded Alberta Gas on this theory."

Alberta contends that, in reaching this conclusion, the district court misapplied *Brunswick*. We do not agree.

For purposes of this discussion, we will assume, as did the district court, that the acquisition is illegal because it enabled Du Pont to bar Conoco from entering the methanol-producing industry as an

independent competitor.[4] In this setting, the concern of the antitrust laws and consumers is the loss of competition between Du Pont and Conoco after the latter's entry into the market as a producer. *See Brown Shoe*, 370 U.S. at 335 (validity of horizontal merger depends on certain factors, including whether it will absorb or insulate competitors, thereby lessening competition between the acquiring and acquired companies).

But Alberta's horizontal injuries do not flow "from that which makes the defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. Alberta's alleged losses were neither connected with, nor resulted from, Du Pont's market power in the methanol-producing industry. That is clear because the same harm would have occurred had any acquirer decided to curtail Conoco's production and marketing plans. For example, a non-methanol producing company, whose merger would not pose antitrust problems, might have been dissuaded from entering the market because of the costs of coal gasification or the depressed prices of oil and natural gas, the more traditional energy

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[4]Our fundamental difference with the dissent is its focus on the illegality and anti-competitiveness of the merger. The comments on intent, for example, are pertinent only to the issue of legality. But the district court assumed the merger violated § 7, as do we on this appeal. Thus, further discussion about the merits, or lack of them, of the merger are not really relevant.

It seems also that the dissent is concerned with the long-range effects of the merger; however, most of Alberta's claimed injuries flow from the absence of the temporary, interim period of market stimulation. Plaintiffs do not, and could not, complain about the ultimate effect of the merger -- the prevention of a competitor's entry into the market.

In short, as we see it, the question presented here is not whether the merger is socially undesirable, but whether these plaintiffs should be allowed to collect damages. That is quite a different question than whether the merger should be permitted.

sources. That Du Pont might have had an additional reason -- a desire not to increase its total production of methanol -- does not change the nature of the effect of Du Pont's decision on Alberta. Alberta, as a competitor, is in no position to claim compensable injury from Du Pont's elimination of a potential increase in output. *See Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1354 (1986) (competitors cannot recover antitrust damages for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output); Page, *supra*, 37 Stan. L. Rev. at 1471 (competitors suffer no antitrust injury from horizontal merger resulting in higher prices).

Further, Conoco's status as a potential competitor in the methanol merchant market is irrelevant to Alberta's theory of injury. Alberta's alleged injuries flow not from the elimination of Conoco as a potential competitor, but from the loss of Conoco as a future *consumer* of methanol.[5] While in this case there may be some connection between Conoco's plan to become a competitor and its plan to consume more methanol in the future, the former plan is really only coincidental to the harm which Alberta supposedly sustained. In a challenge to a horizontal merger, a private plaintiff must show that it was injured because the acquiring and the acquired firms are competitors in a field of commerce. It is not enough to demonstrate that, by

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[5]Thus, Alberta's alleged damages more closely resemble injuries flowing from a "vertical foreclosure" than injuries one would expect to follow from a horizontal merger. We believe, however, that in order for Alberta to maintain an action based on a vertical foreclosure theory, it would, at a minimum, have to demonstrate that a portion of the existing market has actually been foreclosed by the merger. Alberta, of course, cannot make such a showing in connection with its "demand creation" theory.

happenstance, the merging firms are competitors or potential competitors.

In *Brunswick*, bowling centers in three distinct markets contended that the wealthy defendant's acquisition of some of their competitors violated § 7. The Court found no antitrust injury because plaintiffs "would have suffered the identical 'loss' -- but no compensable injury -- had the acquired centers instead obtained refinancing or been purchased by 'shallow pocket' parents." 429 U.S. at 487. Similarly, because Alberta's injuries would have occurred absent a violation of § 7, they do not flow from the anticompetitive effects of the merger.

Moreover, the Du Pont-Conoco merger would not necessarily lead to the loss of profits Alberta claims. Consistent with a finding that the acquisition violated § 7, Du Pont could have chosen to go forward with a coal-based strategy, providing Alberta with its anticipated sales and profits. In *Brunswick*, the Court noted that if Brunswick "acquired thriving bowling centers -- acquisitions at least as violative of § 7 as the instant acquisitions -- respondents would not have lost any income that they otherwise would have received." *Id.* at 487 n.12.

Similarly, if in the future Du Pont proceeds with coal gasification procedures, a development Alberta maintains will occur, the same market effects may well result. Because Alberta's injuries were not proximately caused by the anticompetitive effects of the Du Pont-Conoco merger, they do not flow from the alleged § 7 violation. *See Associated Gen. Contractors*, 459 U.S. at 535-36; *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 94, 96 (3d Cir.) (broker's injuries from reduced commissions not proximately caused by the anticompetitive nature of a pricing agreement because the broker's profits "would not

necessarily be reduced by diminished competition"), *cert. denied*, 107 S. Ct. 87 (1986).

Finally, Alberta's horizontal losses are not injury of the type the antitrust laws were intended to prevent. The *Brunswick* plaintiffs complained that in acquiring each failing bowling center, defendant deprived them of the profits plaintiffs would have realized from increased market concentration when the center went bankrupt. The Court concluded that "it is far from clear that the loss of windfall profits that would have accrued had the acquired centers failed even constitutes 'injury' within the meaning of § 4. And it is quite clear that if respondents were injured, it was not 'by reason of anything forbidden in the antitrust laws.'" 429 U.S. at 488.

In this case, Alberta seeks damages from Du Pont's abandonment of Conoco's strategy to increase demand and price for methanol. As in *Brunswick*, Alberta contends, not that its position worsened as a result of the acquisition, but rather that it was denied sales and profits from an increase in demand -- essentially windfall profits. The antitrust laws, however, do not award damages or equitable relief for losses stemming from the failure of a competitor to bring about an increase in demand and price. *Matsushita*, 106 S. Ct. at 1354; *see also* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1134 (1976) (In *Brunswick*, "the plaintiff never established that its position had worsened -- it argued only that without the merger it would have been better off due to the failure of its competitors. It would be stretching beyond credibility the words 'injur[y] in . business or property' to include within their terms this kind of disappointed expectation of windfall profit.").

The district court accurately described Alberta's claim as one not for a reduction of its existing sales base but the denial of an increase. Significantly,

cancellation of the gasification project did not cause any decrease in the supply of methanol in the marketplace; consequently, the merger did not diminish the amount available to consumers. Alberta's position can be sustained only if the antitrust laws impose an affirmative duty on a producer to expand markets in addition to the prohibitions against undertaking anticompetitive measures to reduce them. Alberta cites no authority for such a construction of the antitrust laws.

From the consumer's standpoint, the development that Alberta anticipated and the basis for its claim -- an increase in methanol price -- would prove distinctly disadvantageous. It is unavailing to argue that Du Pont's failure to bring about an increase in the price of methanol injured Alberta in a manner that the antitrust laws were intended to compensate. *See Cargill*, 107 S. Ct. at 492 (antitrust laws intended to protect price competition); *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), ("[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition"), *cert. denied*, 469 U.S. 1036 (1984).

We are struck, moreover, with the fact that the presence of Conoco as a competitor in the marketplace would not serve Alberta's self-interest in the long run. It is curious that Alberta would assert a loss by conduct of Du Pont which, if Alberta is to be credited, reduced the number of suppliers in the marketplace. If that action helps Du Pont as a producer, it inevitably aids Alberta as well as every other producer.[6] *See generally*

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[6]Alberta says that it "has an inherent competitive advantage over other methanol producers in the United States since it has access to large quantities of inexpensive natural gas, currently the raw material for producing methanol." Brief for appellants at 35.

P. Areeda & D. Turner, *Antitrust Law* ¶ 335.2f, at 239 (1986 Supp.) (joint venture creating disincentive for a foreign producer to commence independent manufacturing operations in the United States would result in reduced competition, which would only benefit a competitor in the American market).

In sum, because Alberta has not asserted antitrust injury from the horizontal aspects of the merger, the district court did not err in granting summary judgment for Du Pont on those claims.

IV.

In analyzing Alberta's vertical injuries, that is, loss of methanol sales to Conoco for its plastic and chemical plants, the district court said that "there is no possibility that Alberta Gas will be able to show damages from any lost sales due to the merger." The court found that by July 1984, Du Pont had divested or shut down Conoco's methanol-consuming operations. The district court also determined that Conoco had no plans before the merger to purchase Alberta's methanol from 1981 to 1984. Therefore, the court concluded that Alberta failed to establish a basis for damages.

Alberta now contends that, with respect to the vertical claim, it can prove at trial it would have sold methanol to Conoco and, therefore, the district court erred in making factual determinations which are subject to substantial dispute. We need not resolve this point because we will affirm on another ground. *See Fairview Township v. EPA*, 773 F.2d 517, 525 n.15 (3d Cir. 1985) (this court may affirm the district court on any basis finding support in the record).

In essence, Alberta seeks compensation for lost sales resulting from Du Pont-Conoco self-dealing after the merger. The district court noted that in 1980, the year before the merger, Conoco purchased 8.9 million gallons of methanol representing approximately 1.8%

of total merchant methanol market sales. Alberta claims injury because Du Pont, and not Alberta, supplied the post-merger methanol requirements for Conoco's New Jersey and Louisiana plants.

In *United States v. General Dynamics Corp.*, 415 U.S. 486, 504 (1974), the Court commented that the probative value of "postacquisition evidence tending to diminish the probability or impact of anticompetitive effects" in a § 7 case is "extremely limited." The need for such a limitation is obvious. "If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." *Id.* at 504-05.

The Court's remarks are pertinent to our present antitrust injury inquiry. To avoid the questionable validity of some postacquisition evidence tending to minimize the future anticompetitive effects of the Du Pont-Conoco merger, we generally will view the acquisition at the time of its occurrence and accept the facts as Alberta asserts them.

Early in the litigation, the district court denied Du Pont's motion to dismiss based on allegations that Du Pont-Conoco self-dealing following the merger foreclosed 3% of the market. As discovery progressed, it became apparent that Conoco's purchases for its chemical plants equalled substantially less than 3% of the merchant market. Although recognizing that foreclosure per se did not constitute a violation of § 7, the court never reexamined the extent to which the market had been affected by the merger, but instead chose to grant judgment on Alberta's failure to prove fact of injury.

Clearly, de minimis foreclosure of a market is not an antitrust dereliction in itself. *See Brown Shoe*, 370

U.S. at 329. Indeed, respected scholars question the anticompetitive effects of vertical mergers in general. As one commentator phrases it: "Foreclosure does not, however, reflect an actual reduction in competition in any meaningful sense." Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 495 (1980); *see also* 4 P. Areeda & D. Turner, *supra* ¶ 1004, at 211 (foreclosure argument has grave weaknesses; only where foreclosures reach monopolistic proportions -- or threaten to do so -- does a vertical merger become troublesome); R. Bork, *The Antitrust Paradox* 226, 237 (1978) ("Antitrust's concern with vertical mergers is mistaken. Vertical mergers are means of creating efficiency, not of injuring competition. . . . [The] foreclosure theory is not merely wrong, it is irrelevant."); Hovenkamp, *supra*, 35 Hastings L.J. at 961 (of all mergers, vertical acquisitions are the most likely to produce efficiencies and the least likely to enhance the market power of the merging firms).

A vertically integrated firm seeking to increase profits will engage in self-dealing if the supplying division's output cannot be more profitably sold elsewhere, or is not more costly or inferior than the product of outside suppliers. *See* 4 P. Areeda & D. Turner, *supra*, ¶ 1004, at 222; R Bork, *supra* at 227-28; Hovenkamp, *supra*, 35 Hastings L.J. at 962. Because of post-merger efficiencies allowing it to purchase the acquiring company's output at a better price than in the marketplace, the acquired company's purchasing costs would fall -- a procompetitive benefit capable of being passed on via lower prices for its products. Thus, in this scenario, post-merger self-dealing could result in efficiencies reflected in lower prices to the ultimate consumer.

Injuries to competitors of this nature should not be compensable under the antitrust law because they do

not flow from the anticompetitive effects of a merger. Far from being caused by any post-merger market power, the competitor's losses would spring from the efficient aspects of the merger. *See Car Carriers, Inc. v. Ford Motor Co.*, 561 F. Supp. 885, 887-88 (N.D. Ill. 1983) (conspiracy to stop dealing with plaintiff motivated by "Ford's desire to replace high-priced suppliers (plaintiffs) with a low-priced one"; losses flowing from termination are not the type of anticompetitive injury the antitrust laws were intended to forestall), *aff'd*, 745 F.2d 1101 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300 (5th Cir.) (franchisor's influencing of soft drink franchisee to assign franchise to firm other than plaintiff did not cause antitrust injury), *cert. denied*, 469 U.S. 833 (1984).

Nor is it helpful to characterize Du Pont's actions as designed to eliminate potential consumers for Alberta's methanol. From this perspective, Du Pont's "predatory" conduct could be viewed as an attempt to decrease the available outlets for Alberta's methanol in an effort to drive it from the methanol-producing market. Serious flaws exist with this theory, however, because Alberta has not proffered evidence that it will be forced from the merchant market as a result of Du Pont's cancellation of Conoco's methanol purchases there. *See Cargill*, 107 S. Ct. at 493; *Matsushita*, 106 S. Ct. at 1355 n.8. Thus, Alberta cannot rely on quasi-"predatory" activities to establish antitrust injury under *Brunswick*. *See generally* R. Bork, *supra*, at 232 (predation through vertical merger is extremely unlikely). As the district court observed, Conoco's purchases in the merchant market in 1980 amounted to only 1.8% of sales in the United States. That percentage in itself is de minimis. The amount of the foreclosure is cut in half when one considers that

in 1980 Du Pont sold Conoco 46% of its methanol consumption. In reality, the merger foreclosed less than 1% of the market.[7] *See United States v. Hammermill Paper Co.*, 429 F. Supp. 1271, 1282 (W.D. Pa. 1977) (market share represented by the acquiring company's previous supply to the acquired firm is not part of the foreclosure). In reviewing these statistics we have assumed, *arguendo*, that Alberta has correctly defined the appropriate market to be the merchant market for methanol in the United States. We observe that Du Pont contends that the proper denominator should include methanol produced for internal operations, a factor which would dramatically reduce the foreclosure.[8]

Alberta has not alleged that the acquisition was part of a pattern of foreclosures in the methanol-consuming market, nor that the merger triggered a pattern of foreclosures which, in the aggregate, would cause harmful effects. *See Brown Shoe*, 370 U.S. at 332-33. Alberta contends that the methanol industry as a whole is highly integrated; nevertheless plaintiff competes in the merchant market, where its losses allegedly occurred.

Since the merger, Alberta has freely sold to the rest of the merchant market and indeed has increased its

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[7]Alberta points to the fact that Conoco purchased only 6.2% of its consumption of 11.7 million gallons in 1979 from Du Pont, a total amounting to 2.1% of the merchant market. Alberta's own marketing plans made before the announcement of the merger anticipated sales to Conoco of only one million gallons in 1982. Even after the merger, however, Conoco bought methanol from outside sources and 81.5% from Du Pont. Therefore, the foreclosure of sales to Conoco in fact was not 100%.

[8]*See* Areeda & Hovenkamp, 1986 Supplement § 520'b 1, discussing the Department of Justice merger guidelines, "captive production and consumption of the relevant product by vertically integrated firms are part of the overall market supply and demand."

annual sales in the United States from 38 million gallons in 1980 to 64 million gallons in 1984 and 83 million gallons in 1985.[9] The circumstances here differ considerably from *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 985 (5th Cir. 1977), where a vertical merger virtually precluded the plaintiff from selling any of its products.

The case at hand more closely resembles *Fruehauf Corp. v. FTC*, 603 F.2d 345, 360 (2d Cir. 1979), in which the court decided that a vertical integration foreclosing 5.8% of the market did not constitute an antitrust violation. The court of appeals concluded that, as a result of this foreclosure, "there would merely be a realignment of existing market sales without any likelihood of a diminution in competition." *Id.* at 360; *see also Crane Co. v. Harsco Corp.*, 509 F. Supp. 115, 125 (D. Del. 1981) (vertical acquisition foreclosing 8.8% of market does not substantially lessen competition); *Crouse-Hinds Co. v. Internorth, Inc.*, 518 F. Supp. 416, 431 (N.D.N.Y. 1980) (plaintiff must show anticompetitive effect as well as significant market foreclosure in vertical merger case under § 7); *United Nuclear Corp. v. Combustion Engineering, Inc.*, 302 F. Supp. 539, 557 (E.D. Pa. 1969) (foreclosures of 5.5% and 19% are "inconclusive" in determining § 7 violation). *See generally* 2 P. Areeda & D. Turner, *supra*, ¶ 527a (absent very high market concentration, a vertical merger may simply realign sales patterns between competitors of the merged and merging firms).

Because the district court assumed that a violation of § 7 existed, the posture of the appeal requires us to

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[9]Alberta contends that the figures for 1980 and 1981 were aberrational because of an antidumping action brought against it by Du Pont. The pretrial stipulation shows Alberta's U.S. sales as 39 million gallons in 1978, 59 million in 1978, and 49 million in 1977.

consider whether foreclosure could be the basis of an infraction here. We conclude that because of its de minimis consequences, the Du Pont acquisition and subsequent foreclosure of Conoco purchases from Alberta does not establish a § 7 violation.[10] Therefore, the loss of sales to Conoco flowing from the foreclosure does not satisfy the antitrust injury requirement as announced in *Brunswick*.

To recover damages in this situation, a private plaintiff must establish foreclosure of a sufficiently large share of the market to violate § 7. Having failed to do that in the present case, Alberta has not established antitrust violation or resulting injury. The fact that Du Pont had a large share in the market before the merger, moreover, does not transform a de minimis foreclosure into antitrust injury any more than Brunswick's superior financial ability turned its acquisitions into unlawful competition for smaller bowling alleys. *See Brunswick*, 429 U.S. at 487. The same harm to Alberta would have ensued if a very small methanol producer had acquired Conoco and imposed total self-dealing.

If the merger were considered unlawful for reasons other than foreclosure of sales, the question then would become whether damages from the foreclosure flowed from the illegal act. Turning once again to *Brunswick*, we reiterate that plaintiff must establish that its harm was caused by that which makes the action unlawful. Assuming the merger violated the antitrust laws because it concentrated economic power

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[10]Judge Hunter agrees that the foreclosure is de minimis and does not establish a violation of § 7. Because he believes that the district court did not assume a § 7 violation as to the vertical claim, Judge Hunter would not address the additional question of whether Alberta was injured by the foreclosure. If the district court did assume a violation of § 7 in resolving the vertical claim, Judge Hunter would join in the court's opinion without that reservation.

in the production of methanol -- as Alberta asserts -- any resulting foreclosure from this concentration is but an incident of, and not a result of, the unlawful act. In this instance, foreclosure losses are not antitrust injury.

For these reasons, we conclude that Alberta has not alleged antitrust injuries from the vertical aspects of the Du Pont-Conoco merger.

V.

In addition to its treble damage claims, Alberta also seeks an injunction under § 16 of the Clayton Act, 15 U.S.C. § 26, dissolving the Du Pont-Conoco merger. For the reasons that Alberta's treble damage claims fail under *Brunswick*, summary judgment is appropriate for Du Pont on Alberta's claims for injunctive relief as well.

VI.

In sum, because plaintiff has not presented evidence of antitrust injury, we will affirm the district court's grant of summary judgment for Du Pont.[11]

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[11]Because we affirm the grant of summary judgment for the defendant, we need not discuss the denial of the plaintiffs' motion for summary judgment.

Becker, J., *dissenting*

This case is before us on appeal of the trial judge's grant of summary judgment for defendants. The facts alleged are quite simple, and the majority has fairly presented them. But the majority appears to have misconceived the plaintiff's claims. It responds to Alberta Gas's arguments with a variety of correct but, in my view, irrelevant legal principles, so that I have had difficulty ascertaining the grounds on which the district court has been affirmed. I therefore set out a brief summary of plaintiff's case which will help explain why I believe the majority has reached the wrong result.

Alberta Gas is a Canadian company which makes methanol. Conoco was an American company with vast coal resources. In 1980, Conoco had firm plans to invest $1 billion in a plant that would transform coal into methanol. Gasoline prices were high in 1980, and Conoco intended to make methanol an automotive fuel as popular as gasoline. In order to stimulate the demand for the millions of gallons of methanol which its new plant was to produce, Conoco intended to create a large network of retail methanol distributors. The size of this network would induce consumers to begin to buy methanol-burning automobiles instead of cars using gasoline, so that when Conoco's plant was ready to produce methanol, a market for the product would be in place. Alberta Gas contends that to operate this network before its own product could be sold through it, Conoco would have bought methanol from a number of other suppliers, including Alberta Gas. In the long run, the argument goes, Conoco's methanol advertising blitz and its efforts to induce people to substitute methanol for gasoline would have dramatically expanded the demand for the product, and its market price would have risen. Alberta Gas would benefit from the rise in price and demand.

Alas, along came DuPont, which manufactured approximately 25-30% of the methanol used in the United States. DuPont used half of this methanol itself and sold the other half in the "merchant" (i.e. spot) market. DuPont acquired Conoco. DuPont then terminated Conoco's plans to invest in the methanol market. Alberta Gas claims that DuPont did so to protect its own monopoly position in that market.

I. The Horizontal Claim

This is not the most believable story about the conduct of rational actors in the marketplace, because it is far from clear that it would make economic sense for DuPont to have behaved as Alberta Gas alleges it did.[1] I would therefore have sympathized with the district court if it had found that the record justified the grant of summary judgment on the ground that Alberta Gas had not put forth enough evidence to make it likely that this arguably improbable story is true. I would be the last one to claim that summary judgment cannot be granted in an antitrust case on that basis. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D.PA 1981), reversed, 723 F.2d 238 (3d Cir. 1983), reversed, 106 S.Ct. 1348 (1986).

But the district court did not grant summary judgment on this ground, and DuPont does not advance the *Matsushita* approach as a ground for

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1. It should be noted, however, that the record contains very strong evidence that Conoco was indeed committed to develop a coal-to-methanol plant, as Alberta Gas alleges. Indeed, Conoco's plans to develop methanol were sufficiently firm that immediately before the merger, Conoco had begun advertising those plans to the public. See Appellant's opening br. at 12, citing A 7459, the text of a television advertisement broadcast during the 1981 Indianapolis 500 auto race, which stated that "Conoco will soon be testing passenger cars powered by methanol, and we're planning to produce this fuel from coal."

affirmance.[2] The district court in this case held that plaintiffs had no *standing* to pursue their claims because it believed that plaintiffs had not alleged that they incurred "antitrust injury" as that term is defined in *Brunswick Corp. v. Pueblo Bowl-O-Mat Corp.*, 429 U.S. 477 (1977). That theory -- not the belief that the plaintiffs have failed to support an implausible theory, and so should not reach a jury -- is also the basis on which this Court now affirms the grant of summary judgment. That is an entirely different matter.

I believe that the majority's result rests on a misconstruction of *Brunswick* and the more recent case of *Cargill Inc. v. Monfort of Colorado*, 107 S.Ct. 484 (1986). In order to explain my view, I begin by pointing out that there is a set of facts under which it would make economic sense for DuPont to behave as Alberta Gas alleges it did. This explanation helps to clarify the fact that DuPont's alleged actions were socially detrimental -- i.e. anticompetitive -- so that Alberta Gas has standing under *Brunswick* to challenge that activity. That set of facts is essentially as follows.

Assume that DuPont, as a participant in the oligopolisitic market for methanol, is earning monopoly rent of $1 per unit on each of the 100 units of methanol it sells: total monopoly rent then equals $100. Assume further that if Conoco were to succeed in its plans to increase the demand for methanol, the number of units DuPont could sell would be 1000. Assume, however, that the market would then be much more competitive (more suppliers would enter the market, and there would be more competition, so that

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2. This Court may review the record independently to determine whether there is an alternative ground for affirmance. But I believe that the size of this record suggests that that task be performed in the first instance by the district court.

the difference beteen price and marignal revenue would fall even though price might rise). Then DuPont might earn only a penny in monopoly rent per unit, instead of $1. Total monopoly rent would now be $10 instead of $100 ($.01 × 1000 = $10.00 instead of $1 × 100 = $100). Alberta Gas alleges that DuPont killed Conoco's plans to prevent this from happening.

Alberta Gas seeks damages for two kinds of injuries.[3] First, Alberta Gas sues for the loss of the sales it would have made to Conoco before Conoco's plant came on line, of the methanol Conoco would have used to set up its network of methanol distributors. Because the plan was terminated, plaintiff allegedly lost this business. In Count I Alberta Gas complains about this loss, which it calls the "vertical injury."[4] But see discussion below, typescript at 14-15.

Second, Alberta Gas says that the increase in demand Conoco would have produced would have driven up both the consumption and the price of methanol over the long term. Alberta Gas has access to a large supply of natural gas, so that its costs are both constant and low. Alberta Gas complains that this rise in consumption and price would in turn have meant an increase in Alberta Gas's profits, and that DuPont's termination of the project took those profits away. This claim the parties have denominated the "horizontal injury."

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3. While the complaint also seeks injunctive relief, Alberta Gas did not seek a preliminary injunction. My understanding is that, at this juncture, Alberta Gas is interested primarily in money damages.

4. The majority concentrates its discussion of the vertical claims on the sales Alberta Gas would have made to Conoco if the latter company had not closed down its chemical manufacturing plants in New Jersey and Texas. As I explain more fully below, see typescript at 12-15. I do not understand Alberta Gas to focus on this point.

With respect to the horizontal claim -- that demand would have been stimulated and prices increased, thereby boosting Alberta Gas's profits -- both the defendants and the majority believe that Alberta Gas has not alleged that it sustained the right kind of injury. They reach this conclusion because they focus on Alberta Gas's complaint that it would have benefited from a price rise rather than a price fall. DuPont and the Court reason that since lower prices are always in the interest of the consumer plaintiff's allegation that it suffered from the failure of prices to rise is really nothing but an allegation that plaintiffs suffered from procompetitive activity. This reasoning is simplistic and incorrect.

In order to have standing to sue under the antitrust laws a plaintiff must be complaining of an injury

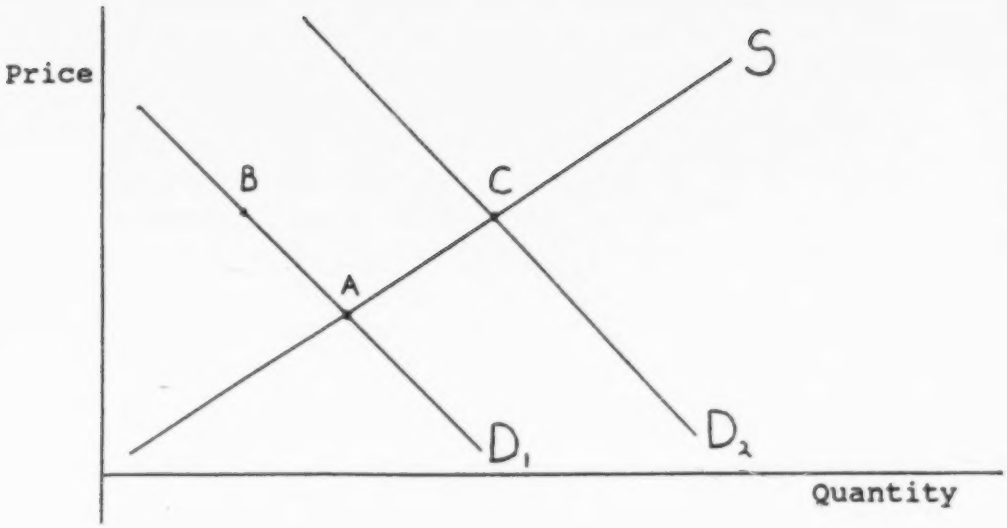
> of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). In *Brunswick*, plaintiff attacked a merger under § 7 which defendants conceded, arguendo, was illegal. Plaintiffs were bowling centers in competition with some of the centers illegally acquired by defendant. Plaintiffs claimed that had defendant not made the illegal acquisition, the lanes plaintiffs competed with would have gone out of business, and that as a result plaintiffs' profits would have risen. The Supreme Court therefore held that a complaint about a loss of profit caused by the acquisition was not a complaint about antitrust injury. The plaintiff in *Brunswick* did not allege that the

merged entity was going to engage in any predatory conduct.

DuPont argues here that Alberta Gas is really only complaining about the fact that the price for methanol did not rise, and that such harm cannot constitute antitrust injury. While it is true that Alberta Gas is complaining about lost profits, the profits were allegedly lost not because DuPont preserved or increased competition -- as the defendant in *Brunswick* was alleged to have done -- but because DuPont *eliminated* competition. The things Conoco allegedly would have done -- investing in a new plant and stimulating demand to ensure that there would be a market for that plant's product -- are procompetitive, socially beneficial activities. The prevention of those activities causes a decrease in social welfare. Alberta Gas was allegedly injured by that decrease in social welfare.

Thus the majority is simply -- and crucially -- incorrect when it states, slip op. at 19, that "[f]rom the consumer's standpoint, the development that Alberta anticipated and the basis for its claim -- an increase in methanol price -- would prove distinctly disadvantageous." A rise in price is harmful to consumers if it represents only movement along an unchanged demand curve -- a movement from point A to point B on the graph below. But here the rise in price would have been caused by a shift to the right of the demand curve -- a movement from point A to point C. This shift in the demand curve indicates that the commodity sold has become more useful to consumers.



Such a change is indeed socially beneficial, and therefore procompetitive, not anticompetitive and harmful.[5] This shift would also benefit Alberta Gas in the long run, increasing its profit, even though it might harm DuPont, lowering its profit, for the reasons I have set out at typescript at 1-2.

The majority thus has no basis to invoke *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1354 (1986), for the proposition that "competitors cannot recover antitrust damages for a conspiracy to impose nonprice restraints that have the

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5. The majority's error in focusing on the rise in price can also be seen clearly from the fact that Alberta Gas's complaint about lost profits would be essentially the same even if the market price for methanol did not rise at all. If all suppliers produced methanol with the same cost structure as Alberta Gas -- i.e., at constant marginal cost -- the market price would not have risen at all in response to an increase in demand. But profits would still have risen if demand increased. As the graph below explains, profits would have risen

effect of either raising market price or limiting output." The Supreme Court's point there was that one seller in a market will not be injured by anticompetitive activity which, *while the demand curve remains unmoved*, raises the market price. But here the practice which would have raised price was not anticompetitive, such as "a conspiracy to impose nonprice restraints;" rather, it is alleged here that price would have risen as a result of procompetitive activity which would have stimulated demand. *Matsushita* says nothing about a competitor's standing to protest the elimination of procompetitive activity.

This discussion also explains why the majority is wrong in characterizing plaintiff's complaint as an attempt to recoup "windfall profits." See majority opinion at 18. The authorities cited by the majority -- *Matsushita* once again, and a law review article about *Brunswick* -- characterize as a "windfall" the benefits that one competitor in a market would have received if another competitor engaged in *anti*competitive

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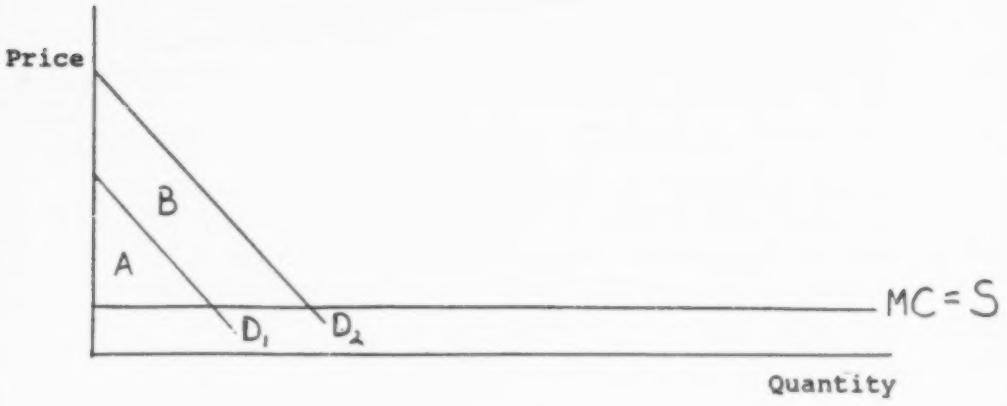
from the amount represented by area A to the sum of that area and area B. And Alberta Gas would still have lost profits as a result of DuPont's anticompetitive actions.



conduct which raised the market price. Here the allegation is that the price would have risen as a result of *pro*competitive activity. A benefit from increased competition is not a windfall; it is exactly the kind of benefit which the antitrust laws were intended to preserve. This is no less true simply because one of the beneficiaries of this competition is a competitor.

The majority also seeks support from an argument made in *Brunswick*, but I believe that the majority has misconstrued that argument and so misuses it here. To help identify what it meant by "antitrust injury," the Supreme Court in *Brunswick* pointed out that the plaintiffs in that case would have been injured in exactly the same way if the bowling alleys with which they competed had been acquired by someone other than defendant. The Court thus observed that "[r]espondents would have suffered the identical 'loss' -- but no compensable injury -- had the acquired centers instead obtained refinancing or been purchased by 'shallow pocket' parents." 429 U.S. at 487. The majority attempts to make the same point in this case, arguing that if Conoco had been acquired by another company, not in the methanol market, and that company had terminated Conoco's plans to make these investments, then Alberta Gas would have suffered in exactly the same way. In that set of circumstances, DuPont concludes and the plaintiff concedes that the merger would not have been illegal under § 7. The anticompetitive motivation which DuPont allegedly had here would have been absent. The majority therefore concludes that plaintiff has not alleged antitrust injury.

I believe the majority's argument is wrong because it misstates the manner in which the law uses intent to explain the significance of anticompetitive activity. If another company had bought Conoco and terminated the plans, it would have done so because the plans were

unwise. DuPont claims that that is why it, too, terminated the plans. But plaintiff claims that DuPont eliminated the plans to protect DuPont's market power in the methanol market. If that is why DuPont did what it did, then another purchaser probably would not have terminated the investment plans. DuPont's alleged intention indicates the anticompetitive effect of its actions. While the antitrust laws regulate conduct, as distinguished from intentions, Justice Brandeis explained long ago that

> the reason for adopting the particular remedy [and] the purpose or end sought to be attained . . . are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge or intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

Alberta Gas is arguing that DuPont's actions have had an anticompetitive effect. Justice Brandeis' statement in *Chicago Board of Trade* demonstrates that both the fact that DuPont (rather than another company) bought Conoco, and DuPont's reason for buying Conoco, are relevant evidence of the purchase's ultimate effect. The fact that no anticompetitive results would have ensued if Conoco had been bought by General Foods is irrelevant, and does not provide a basis for dismissal for lack of standing in view of Alberta Gas's allegations about DuPont's intentions.[6]

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6. I also do not understand the majority's *Brunswick*-based argument that Alberta Gas's claim offends the principle that a plaintiff's injury in a § 7 case must stem from that which makes the merger illegal. See majority opinion, typescript at 16-17, citing *Brunswick*, 429 U.S. at 487 n.12. The majority observes that if DuPont later decides to go through with Conoco's plans to develop a

Finally, defendants and the majority draw support for their conclusion that plaintiff lacked standing from the Supreme Court's recent opinion in *Cargill, Inc. v. Monfort of Colorado*, 107 S.Ct. 484 (1986). There the Court held that Monfort had no standing to challenge a merger when it alleged that the merged entity would lower prices because the plaintiff had not alleged that the defendants would engage in predatory pricing -- i.e. pricing below cost.

In the course of that opinion, however, Justice Brennan explicitly warned against precisely the error now made by the majority. The Justice Department, as amicus curiae, argued that no plaintiff should ever have standing to challenge a merger on grounds that the merged entity would engage in predatory pricing because the Justice Department thought that predatory practices are economically irrational and therefore that businesses would virtually never engage in them. Justice Brennan rejected flatly this contention, however, holding:

> While firms may engage in the practice only infrequently, there is ample evidence suggesting

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coal-to-methanol plant. Alberta Gas will receive the same profits it would have received if Conoco had developed the plant itself. See majority opinion, typescript at 17. The majority concludes from this that "Alberta's injuries were not proximately caused by the anticompetitive effects of the DuPont-Conoco merger, [so that] they do not flow from" that which made the merger illegal under § 7 of the Clayton Act. The majority's point appears to be that because DuPont could have decided after the merger to continue with the plans, the merger itself is not the source of Alberta Gas's injury.

Alberta Gas's point is that the merger was illegal because DuPont used it as a means to eliminate Conoco's coal-to-methanol plant. If DuPont had bought Conoco and continued Conoco's plans to build the plant, the merger would not have been illegal in the first place. The thing which made the merger illegal is therefore the thing which caused Alberta Gas's injury.

> that the practice does occur. It would be novel indeed for a court to deny standing to party seeking an injunction against threatened injury merely because such injuries rarely occur.

107 S.Ct. at 495 (footnote omitted). The majority here has held squarely that Alberta Gas lacks standing because the actions it challenges would only rarely be anticompetitive. The Supreme Court has just told us that is wrong.

II. The Vertical Claim

I also believe the majority has completely misconstrued the plaintiff's "vertical" claim for damages. The plaintiff primarily complains about the sales it would have made to Conoco if Conoco had gone through with its plans to build a large network of methanol dealers. The majority has rejected that claim on the groud that as things turned out -- i.e. in light of the fact that Conoco's plans were terminated -- Conoco bought only a small amount of methanol on the open market, to fill the methanol demand of its chemical plants; the majority therefore concludes that Alberta Gas's claim is de minimis. Since no significant damages have been alleged, holds the majority, summary judgment was properly granted for defendant. See majority opinion, typescript at 22.

With respect, the majority has missed the point. Plaintiff is not complaining about the fact that once Conoco's coal gasification plans were terminated, Conoco purchased only a bit of methanol on the open market and that Alberta Gas got none of *that* business. Plaintiff's point is that *if DuPont had not purchased Conoco and terminated the coal gasification plans*, Conoco would have bought much more, and that Alberta Gas would have sold Conoco much of that increment. I have no idea whether or not that in fact

would have happened, but if Alberta Gas is right it has certainly stated a non de minimis claim for damages.

Once this point is clear it is also apparent that the majority errs in relying on the doctrine that vertical mergers cannot be anticompetitive. See majority opinion, typescript at 22, citing William H. Page, *Antitrust Damages and Economic Efficiency*, 47 U. Chi. L. Rev. 467 (1980); Phillip Areeda and Donald F. Turner, *Antitrust Law* § 1004; Robert H. Bork, *The Antitrust Paradox* 226 (1978). Those authorities hold that there is nothing anticompetitive about a vertical merger in which a downstream purchaser of a given product merges with a producer of that product, so that the downstream purchaser's needs are satisfied entirely within the merged entity instead of being filled on the open market. The assumption in that situation is that the magnitude of the downstream user's demand remains the same before and after the merger; the only thing that changes is the identity of the supplier. These authorities say, and I certainly agree, that such a change in the name of the seller is not likely to be anticompetitive.

In this case, by contrast, Alberta Gas is not complaining simply that demand which it could have filled is now being filled by DuPont. Alberta Gas is complaining that demand which it could have filled now does not exist, because DuPont terminated the project which would have given rise to the demand. The theory of vertical foreclosure says nothing one way or the other about that argument. It certainly does not hold that the elimination of such new demand has no anticompetitive consequences. And I have already explained why DuPont's actions may indeed have had anticompetitive effects.

Put another way, Alberta Gas alleges that this is not a vertical merger at all but a horizontal one, in which both companies sell -- or were about to sell --

methanol. Under this analysis, arguments from the economics of purely vertical mergers are entirely irrelevant.

As DuPont itself has argued, the vertical and horizontal claims are really two parts of a single violation of § 7,[7] and I suspect that the majority mischaracterizes Alberta Gas's vertical claims because it misconceives and rejects the horizontal theory. Having decided that Alberta Gas may not sue on DuPont's elimination of Conoco's plans to expand demand, the majority ignores the purchases Conoco would have made from Alberta Gas as a part of those plans. Having ignored those purchases, the majority concludes that there are no vertical damages.

If the demand creation theory is recognized as valid, however, as I have argued it should be, it is also apparent that the vertical claim involves quite a substantial injury rather than the de minimis damages which the majority finds. Thus the majority's error on the vertical theory is simply a compounding of its mistake concerning the vertical claim.

III. Actual Potential Competition

Because I believe that plaintiff has alleged that it suffered antitrust injury, I believe we also must reach a question about the law on potential competition which defendant offers as an alternative ground for affirmance, see Appellee's br. at 40 n. 34. The issue has been raised many times in litigation, but no appellate court has ever squarely faced it.

In *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973) and *United States v. Marine Bancorp.*, 418 U.S. 602 (1974), the Supreme Court theorized that two kinds of potential competition might be within the

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7. See Appellee's br. at 24-25.

reach of Clayton Act § 7, which prohibits mergers and acquisitions by one company of another if "the effect of such acquisition may be substantially to lessen competition." Under the first theory, "perceived potential competition," the Supreme Court held that competition might be diminished if a company which industry participants had thought might actually enter the market on its own instead simply acquired a company already in that market.

> [T]he Court has interpreted § 7 as encompassing what is commonly known as the "wings effect" -- the probability that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in that market as likely to enter *de novo*. *Falstaff*, [410 U.S.] at 531-537. The elimination of such present procompetitive effects may render a merger unlawful under § 7.

Marine Bancorp., 418 U.S. at 625 (footnote omitted). Perceived potential competition focuses on the premerger effect on prices of the perception that if profits rise, a new company will enter the market and drive down both prices and profits.

The Court has also discussed a second kind of potential competition, which has been called "actual potential competition." In *Marine Bancorp.* the Court observed that it

> has not previously resolved whether the potential competition doctrine proscribes a market extension merger solely on the ground that such a merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a *de novo*

> undertaking or through the acquisition of a small existing entrant)a so-called foothold or toehold acquisition). *Falstaff* expressly reserved this issue.

Id. (footnote omitted). The actual potential competition doctrine concerns the elimination of a company which would otherwise have entered the market either by itself or by acquiring a small company and infusing capital into it. Actual potential competition relates to the effect such a new entry -- and its elimination -- would have had on prices.

I believe this case forces us to address that question. The issue presented here is slightly different, but I think the differences are irrelevant. This case requires us to assess the legality of a merger which prevented the acquired firm from entering a market which the plaintiff claims the acquired firm would otherwise have entered. Here Alberta Gas argues that, had DuPont not acquired Conoco, Conoco would have proceeded with its plans to enter the methanol market. This claim is not identical to the one made in *Marine Bancorp.*, because here plaintiff does not claim that, but for the acquisition, DuPont would have entered the methanol market itself or made a "toe-hold" acquisition. But, as in *Marine Bancorp.*, the claim is that the merger eliminated a company which would otherwise have actually entered the methanol market.

No court has yet decided whether § 7 authorizes a claim that a merger is illegal because it eliminated actual potential competition. The Supreme Court in *Marine Bancorp.*, and three courts of appeals, have established the elements of such a claim but have never found them all satisfied, so these courts have never actually had to hold that satisfaction of the doctrine's requirements constituted a violation of § 7. See *Tenneco, Inc. v. F.T.C.*, 689 F.2d 346, 352-55 (2d Cir. 1982); *United States v. Siemens Corp.*, 621 F.2d 499,

506 (2d Cir. 1980); *Republic of Texas Corp. v. Board of Governors*, 649 F.2d 1026, 1048 (5th Cir. Unit A 1981) (discussing Clayton Act standard incorporated into § 3 of the Bank Holding Company Act); *Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 1255, 1265 (5th Cir. Unit A 1981) (same; stating that the actual potential competition "doctrine has logical force and is consonant with the language and policy of the Clayton Act" but that "[i]n the absence of necessary findings by the Board, however, we will not decide whether the doctrine adequately describes a violation of the Clayton Act standard" incorporated into the Bank Holding Company Act); *F.T.C. v. Atlantic Richfield*, 549 F.2d 289, 293-94 (4th Cir. 1977); see also Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1362-86 (1965) (describing and supporting the doctrine). It seems quite likely, however, that if a case were to come along which presented all the elements of the claim, the courts would decide that the claim is a valid one under § 7. I think this is such a case.

As it is usually presented, the elements of an actual potential competition claim are that

1. the relevant market is oligopolistic;

2. absent the acquisition, the acquiring firm would have entered the market in the near future either *de novo* or through acquisition of a little company; and

3. such entry by the acquiring firm carried a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects.

Tenneco, Inc., v. F.T.C. 689 F.2d 346, 352 (2d Cir. 1982), citing *Marine Bancorp.*, 418 U.S. at 630, and a number of other circuit court cases.

I think that Alberta Gas has properly alleged each of these elements. Defendant agrees that the relevant market is oligopolistic; during the relevant time period two firms controlled 50%, four firms 70%, and nine firms essentially %100 of the industry.

The second claim is a bit tricky. In the typical potential competition case the alleged potential competitor is the acquiring firm. Here the alleged potential competitor is the acquired firm, Conoco. The § 7 cases are not structured this way, and no cases like this appear to have been brought under § § 1 and 2. But this difference in structure certainly should not make any difference in result; the fear is still that an entrant into the market is being eliminated. Indeed, insofar as the difference matters at all it suggests that the actual potential competition doctrine is more fitting here than in the typical case. In most instances the difficulty comes in proving that, but for the challenged acquisition, the acquiring firm would have entered the market in some more socially beneficial way. Here there is no question that Conoco was about to enter the methanol market in a big way and that DuPont's purchase of Conoco prevented that entrance.

I also think that Alberta Gas has adequately alleged the third element of a successful claim. DuPont has attacked this aspect of Alberta Gas's case by arguing that plaintiff has not alleged the loss of "procompetitive effects," though DuPont has cast this argument in the standing context. I have already explained why I believe that argument is wrong.

Conclusion

For the foregoing reasons I would reverse the grant of summary judgment on standing grounds and remand this case to the district court. I would instruct

that this remand is without prejudice to a renewed summary judgment motion, made on the ground that the record did not contain sufficient evidence to warrant putting plaintiff's case before a jury.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
District of New Jersey

CHAMBERS OF
HERBERT J. STERN
JUDGE

UNITED STATES COURT HOUSE
NEWARK, NJ 07101

June 5, 1986

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Re: Alberta Gas Chemicals Limited, et al. v. E. I. Du Pont de Nemours and Company, et al.
Civil Action No. 81-3024
LETTER-OPINION

Counsel:

This is an antitrust suit brought under Section 7 of the Clayton Act, 15 U.S.C. § 18. Plaintiffs, Alberta Gas Chemicals, Ltd.,

a Canadian natural gas producer, and its New Jersey subsidiary Alberta Gas Chemicals, Inc. (collectively "Alberta Gas" or plaintiff"), challenge the 1981 merger of defendants E. I. Du Pont de Nemours & Co. and Conoco, Inc. Plaintiff alleges that the merger may have the effect of lessening competition in the market for methanol in the United States. Plaintiff seeks money damages in the amount of 98.5 million Canadian dollars in lost profits and interest, and 153 million Canadian dollars in reduced value of plaintiff's business. Plaintiff also seeks equitable relief in the form of an injunction ordering Du Pont to divest itself of Conoco.

On this motion, defendants urge the Court to reject plaintiff's demand for money damages on the grounds that it cannot show antitrust injury, which is a prerequisite for a private damages action under Section 4 of the Clayton Act, 15 U.S.C. § 15; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

Defendants have styled their motion as a "motion in limine." In all but name, it is a motion for partial summary judgment, and it is treated as such in the papers of both parties. As explained below, I will also treat this motion as one for partial summary judgment.

Plaintiff asserts two theories of injury for which it demands money damages. The first concerns the effect of Conoco's termination of plans to manufacture and market methanol from coal. I will grant summary judgment to defendants on all damage claims asserting this theory of injury. The second concerns the effects of the vertical integration of Du Pont, a producer of methanol, and Conoco, a consumer of methanol. Although defendants assert that their motion is dispositive of all of plaintiff's damage claims, this theory of injury is not mentioned in defendants' motion papers, and so, of course, I must deny the motion as to damage claims asserting this theory of injury.

I. The Form of the Motion

Defendants style their motion as a "motion in limine for an order precluding plaintiffs from presenting evidence on damages."

The "motion in limine," which is not mentioned in any of the Federal Rules of Evidence, Civil Procedure, or Criminal Procedure, has become current only in recent years, *see* E. Cleary, *McCormick on Evidence* (3d Ed.) 128. Not long ago this Circuit approved the use of the motion on evidence issues at the discretion of the trial court, *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 260 (3d Cir. 1983).

The Supreme Court has defined the term "motion in limine" to mean "any motion, whether before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." The Court found that the district court's authority to entertain such motions arose from the district court's "inherent authority to manage the course of trials" and from Rule 103(c) of the Federal Rules of Evidence, which instructs that proceedings "shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means." *Luce v. United States*, 469 U.S. 38, 463 (1984). Motions in limine almost invariably turn on one or another of the Rules of Evidence, and there are opinions permitting or discouraging their use in various contexts, *e.g.*, *Zenith Radio Corp. v. Matsushita Electric Industrial Corp.*, 505 F. Supp. 1125, 1146 (E.D. Pa. 1980) (motions in limine are appropriate for threshold determinations of trustworthiness pursuant to Rule 803(8)); *Rioux v. Daniel International Corp.*, 582 F. Supp. 620, 626 (D. Maine 1984) (motion to exclude evidence under Rule 407 should usually be made during trial, not in advance.)

The motion at hand claims to be a motion to "preclude plaintiffs from presenting evidence," but the accompanying memorandum of law refers to no evidentiary rule, and makes no reference to any of the proposed witnesses and exhibits listed by plaintiffs in the pretrial stipulation submitted to the Court on April 28, 1986. Instead, defendants launch directly into an argument concerning the nature of plaintiff's alleged injury and its legal sufficiency as a predicate for money damages relief.

Defendants may have intended to argue that their position, if successful, would lead to the exclusion of plaintiff's damages evidence on relevancy grounds, Fed. R. Evid. 403. But it is not

at all obvious that much of plaintiff's damages evidence is not also relevant on the issues of liability and equitable relief. Indeed, defendants themselves state in their section of the pretrial stipulation that due to the intertwined nature of the issues, "it is not practicable to separate the witnesses according to liability and damages." An acceptance of defendants' position on the legal sufficiency of plaintiff's damages case, therefore, does not lead to any conclusion as to the relevancy of plaintiff's proposed evidence. In any event, "orders *in limine* which exclude broad categories of evidence should rarely be employed," *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975).

Defendants' leading case, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), presented exactly the same issue of law raised here. Defendant/petitioner Brunswick sought and was granted judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. Like the motion for a directed verdict, of which it is technically a renewal, C. Wright & A. Miller, 9 Fed. Prac. & Proc. § 2537, the motion for judgment *n.o.v.* requests the court to "withdraw from the jury a case in which there is no issue of fact requiring the jury's determination," *Manaia v. Potomac Electric Power Co.*, 268 F.2d 793, 799 (4th Cir.), *cert. denied*, 361 S. Ct. 913 (1959); *cf.* 9 Wright & Miller at §§ 2521, 2522; *Maggipinto v. Reichman*, 607 F.2d 621, 624 (3d Cir. 1979). The analogous pretrial motion is the motion for summary judgment pursuant to Rule 56, and indeed the Supreme Court has said that the primary difference between Rule 56 and Rule 50 motions concerns their timing, as motions made either before or during trial, *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 745 n. 11 (1983).

The proper procedure for defendants, therefore, would have been to move for partial summary judgment. The question now arises, can this Court treat the present motion as one for partial summary judgment?

The Court believes that this procedure will not prejudice defendants in any way. Discovery is closed and a pretrial stipulation has been submitted, limiting plaintiff's damage claims to those set forth therein. There is no possibility, therefore, that

granting this motion will foreclose any opportunity for plaintiff to develop new theories of damages or to attempt to discovery additional facts that might support its claims.

Furthermore, defendants for the purposes of this motion take all of plaintiff's assertions as true. They have submitted no affidavits and request no findings of fact to be made against the plaintiff. Nor do they argue that the facts as alleged are not sufficient proof of the claims asserted. Instead, they rely strictly upon their belief that even if plaintiff were to prevail on all factual issues at trial, defendants would still be entitled to judgment as a matter of law, Rule 56(c). All of the facts plaintiff intends to prove are contained in the pretrial stipulation, and the Court will take these facts as proved. Thus, the lack of notice to plaintiff that the motion is to be treated as one for summary judgment, and its consequent loss of the opportunity to submit material to show the existence of genuine issues of fact, will not work to its disadvantage.

Lastly, the plaintiff did not protest the form of this motion, and instead met the arguments it presents head-on, with the clear expectation that the Court would rule on the merits of the question presented.

For these reasons, I find that no prejudice will result from the conversion of this motion from a motion in limine to a motion for partial summary judgment. This will not be the first time a motion in limine has been so treated, *e.g.*, *Jenkins v. Wiltaker Corp.*, 551 F. Supp. 110, 113 (D. Hawaii 1982); *Hood v. Dealers Transport Co.*, 459 F. Supp. 684, 685 (N.D. Miss. 1979); *United States v. Nu-Phonics, Inc.*, 433 F. Supp. 1006, 1010 (E.D. Mich. 1977).

II. The Question Presented

Plaintiff Alberta Gas alleges that the merger of Du Pont and Conoco violates § 7 of the Clayton Act. For the purposes of this motion, defendants ask the Court to assume that the merger is in violation of the law. They also accept for the sake of argument that Alberta Gas was injured to the extent and for the reasons that it puts forth in the stipulated pretrial order. They

then ask for a determination that the injury alleged – and taken as proved – is not *antitrust* injury, so that the damages resulting from it are not cognizable under § 4 of the Clayton Act, *Brunswick*, 429 U.S. at 489-90.

A. The Factual Background

In order to make this determination, it is necessary to review some of the underlying facts of the case, as stipulated by all parties or as alleged by Alberta Gas. This review does not purport to make findings of fact for use anywhere except on this motion.

Alberta Gas produces methanol from natural gas, and sells tens of millions of gallons of methanol to customers in the United States. Du Pont is the largest producer of methanol in the United States; it produces hundreds of millions of gallons of methanol. In 1981, the year of the merger, Du Pont used about half of its production of 450 million gallons in its own operations, and sold the other half to other consumers of methanol on what plaintiff calls the "merchant market."

Du Pont continues to sell methanol to consumers in unspecified amounts. Du Pont "possesses substantial market power" and "is able to engage in conduct which prejudices firms that purchase methanol from firms such as Alberta Gas," says the plaintiff in the pretrial stipulation.

Conoco, Inc. was at the time of the merger a consumer of methanol, purchasing 8.7 million gallons in 1980 for use in the manufacture of various chemicals. Conoco is also a very large refiner and marketer of petroleum products, including motor gasoline. Additionally, Conoco was at the time of the merger the second largest producer of coal and the largest holder of coal reserves in the United States.

Conoco is not and has never been a producer of methanol in commercial quantities. However, Conoco had for over 30 years been studying the possibility of producing gas from coal and producing methanol from the synthetic gas. Before the acquisition, Conoco had firm plans to build and operate large-scale methanol producing plants, and to market this methanol on the

merchant market, and to develop new markets for methanol as a motor fuel, either alone or in combination with gasoline (as what has been called "gasohol"). These efforts would have greatly expanded the demand for methanol.

After the acquisition, however, Du Pont "stifled Conoco's desire to manufacture methanol from coal, and canceled Conoco's plans to expand and develop uses for methanol, and to construct a coal to methanol plant, and closed Conoco's Newark plant" (where methanol was consumed in the production of chemicals).

Alberta Gas asserts that the merger violates § 7 in the following passage from the pretrial stipulation:

> The effect of the acquisition has been and may be substantially to lessen competition in the relevant markets or submarkets in that:
>
> A. Competition among methanol producers for sales to Conoco, a significant purchaser of methanol, has been and will be eliminated;
>
> B. Competition generally among methanol producers in the production and sale of methanol has been and will be substantially lessened;
>
> C. Competition among methanol producers for the opportunity to swap methanol with Conoco has been prevented;
>
> D. DuPont's market power has been and will be increased;
>
> E. The high concentration among producers has been maintained to the detriment of competition;
>
> F. The high degree of vertical integration has been maintained to the detriment of competition;
>
> G. Potential competition between DuPont and Conoco has been and will be eliminated; and

H. A reduction of overall industry methanol requirements is likely because of the loss of Conoco's innovative leadership in developing new methanol derivatives and new uses for methanol.

The pretrial stipulation goes on to assert that Alberta Gas will prove at trial the following statements in regard to damages:

1. Without DuPont's acquisition of Conoco, Alberta Gas would have been annually supplying, from 1982 onwards, an average of at least 27,000,000 gallons of methanol to Conoco and an additional 20,000,000 gallons to other purchasers, whose demand for methanol for fuel uses would have been stimulated by Conoco's development of those uses.

2. If DuPont had not acquired Conoco, the price of methanol would have been on average about 15 cents per gallon higher from 1982 onwards, due to the additional demand for methanol.

3. Through June 30, 1985, the effects of the acquisition caused Alberta Gas to lose profits in the amount of 80,352,000 Canadian dollars resulting from lower net selling prices obtained in the United States and elimination of sales to Conoco and others.

4. Through June 30, 1985, the effects of the acquisition caused Alberta Gas to lose 18,144,000 Canadian dollars in interest expense as a result of reduced cash flow from operations.

5. As of June 30, 1985, the effects of the acquisition caused the value of Alberta Gas' business to be 153,260,000 Canadian dollars less than that value would have been absent the acquisition.

B. Are the Injuries Alleged "Antitrust Injuries"?

Alberta Gas brings this suit under § 7 of the Clayton Act, 15 U.S.C. § 18, which reads in relevant part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be to substantially lessen competition, or to tend to create a monopoly.

Alberta's standing to sue for damages for a violation of § 7 is asserted under § 4 of the Clayton Act, 15 U.S.C. § 15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

In order to maintain a § 4 damages action for a § 7 violation, a private plaintiff must show an injury caused not merely "by reason of an unlawful acquisition, but by reason of that which made the acquisition unlawful," *Brunswick*, 429 U.S. at 488.

Alberta Gas here asserts damage claims stemming from two separate injuries. First, it claims damage as a result of foreclosure of a portion of the market for methanol, resulting from the vertical integration of Du Pont, a methanol producer, and Conoco, a methanol consumer. Second, it claims lost sales as a result of Du Pont's termination of Conoco's plans to build demand for methanol as a fuel. The first of these claims asserts an innury compensable under § 4; the second does not. Summary judgment for defendants, therefore, will be denied as to the damage claims based on injury resulting from vertical integration. It will be granted as to the damage claims based on injury resulting from Conoco's failure to build demand for methanol.

1. Vertical Integration

Alberta Gas asserts that after the merger, Du Pont took over Conoco's methanol-consuming operations and began to supply them with Du Pont-produced methanol. Conoco was thus withdrawn from the market for methanol producing by other producers, including Alberta Gas. This theory of injury is contained in the paragraphs cited from the pretrial stipulation, above, marked, A, B, C, F, and perhaps D and E. The damages alleged to have resulted from this injury form part of the amount stated in the paragraph marked 1, and perhaps in the subsequent paragraphs.

Although vertical mergers are not *per se* violations of § 7, *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, 351-52 (2d Cir. 1979), they can produce a lessening of competition under certain industry conditions, *Brown Shoe Co. v. United States*, 370 U.S. 284, 328 (1962). Because "foreclosing ... competitors ... from a segment of the market of the market otherwise open to them" is the aspect of the vertical merger that creates the illegality, *Brown Shoe*, 370 U.S. at 323-24, there is no doubt that an injury resulting from such a foreclosure is an antitrust injury compensable under the *Brunswick* standard, *see Heatransfer Corp. v. Volkswagenwerk A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978) (upholding competitor's right to damages as foreclosure theory in § 7 case).

2. Demand Creation

Alberta Gas claims that the merger of Du Pont and Conoco has lessened competition because Du Pont was able to and did terminate Conoco's plans to become a major producer of methanol. This termination, it is alleged, was not one that would have taken place absent the merger. (Alberta Gas does not explain why Du Pont would have taken this action if it was not justified by industry conditions. However, this omission is unimportant because Du Pont concedes liability for the purposes of this motion.)

Alberta Gas alleges in the paragraphs marked G and H, above, that the elimination of Conoco as a future producer of methanol

will tend to lessen competition in two ways. First, "potential competition between Du Pont and Conoco has been and will be eliminated." Second, "the loss of Conoco's innovative leadership in developing new methanol derivatives and new uses for methanol" will lead to "a reduction of overall industry methanol requirements." However, a "reduction" — actually the absence of a projected increase — in industry demand is not at all identical to a lessening of competition. Alberta Gas alleges no damages as a result of the elimination of potential competition between Du Pont and Conoco. Instead, the damages alleged are purely the result of the failure of demand to rise. Alberta Gas alleges that it lost sales to purchasers "whose demand for methanol would have been stimulated by Conoco's development of those uses; and that had there been no merger, "the price of methanol would have been on average about 15 cents per gallon higher ... due to the additional demand for methanol," paragraphs 1 and 2 above.

The damages alleged are thus entirely the result of Conoco's failure to promote methanol as a fuel. Conoco's efforts to create demand for fuel methanol would, says Alberta Gas, have redounded to the benefit of all methanol producers by increasing both the value and the price of methanol sold in the United States. By terminating Conoco's plans, Du Pont deprived Alberta Gas of the profits it anticipated in helping fill this newly created demand.

It should be immediately obvious that this alleged injury bears absolutely no relationship to the aspect of the merger which is said to make it illegal under § 7, that is, that it lessens competition in the methanol industry. Injury to Alberta Gas as a result of the decision to terminate Conoco's methanol-making plans is completely unconnected to Du Pont's methanol-producing capacity. It would have occurred had any acquirer of Conoco chosen to terminate those plans, *see Brunswick*, 429 U.S. at 477.

Furthermore, Alberta Gas' alleged injury is actually the result of Conoco's failure to *reduce* competition in current methanol markets. Alberta Gas asserts that Conoco could have singlehandedly made methanol a competitor of gasoline. By diverting demand for gasoline to methanol, Conoco would have

created an opening for suppliers of traditional methanol users to hike their prices, without fear of undercutting by competitors. This sort of "loss of windfall profits" is exactly the sort of alleged injury that failed to meet the requirement of antitrust injury in *Brunswick*, 429 U.S. at 488; *see Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210 (3d Cir. 1980). No damages can possibly be awarded Alberta Gas on this theory. Summary judgment will be entered for defendants on plaintiff's damage claims arising from this theory of injury.

Very truly yours,

/s/ Herbert J. Stern

HERBERT J. STERN
United States District Judge

Orig. to Clerk's Office
Newark, New Jersey

APPENDIX C

UNITED STATES DISTRICT COURT
District of New Jersey

CHAMBERS OF
HERBERT J. STERN
JUDGE

UNITED STATES COURT HOUSE
NEWARK, NJ 07101

September 3, 1986

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Re: Alberta Gas Chemicals Limited, et al. v. E. I. Du Pont de Nemours and Company, et al.
Civil Action NO. 81-3024
LETTER-OPINION

Counsel:

On June 5, 1986, I issued an order granting defendants' motion for partial summary judgment in this matter. At my request, defendants have now moved for summary judgment on plaintiff's remaining claims. That motion will be granted. This opinion presumes a familiarity with the opinion issued in conjunction with my order of June 5.

I. *Alberta Gas' Motion for Clarification*

As a preliminary matter, it is necessary to address Alberta Gas' request for clarification of the June 5 order. That order granted summary judgment to Du Pont in "plaintiff's claims for damages arising out of the termination of Conoco's plans to produce and market methanol from coal." Alberta Gas acknowledges that now the order applies to methanol sales it allegedly lost to third parties as a result of the termination of Conoco's plans to pursue coal-to-methanol conversion. It asks for clarification of whether the order applies to claims of damages resulting from lost of methanol sales to Conoco itself.

The order does not distinguish between damages resulting from lost sales to Conoco, damages resulting from lost sales to others, or damages from any other source. It disallows *all* claims for damages arising out of the transaction of Conoco's plans for coal-to methanol conversion. Alberta Gas has not shown any legal reason why sales to Conoco should be exempted from the order. I find that the order is quite clear as written. The motion for clarification will be denied.

II. *Du Pont's Motion for Summary Judgment*

Broadly speaking, two of Alberta Gas' claims against Du Pont survived the court's order of June 5. One is for damages resulting from lost methanol sales to Conoco resulting from Conoco's alleged status as a captive customer of Du Pont. The other is for an injunction dissolving the merger of Du Pont and Conoco.

A. *Damages Due to Lost Sales to Conoco as a Captive Customer*

Alberta Gas alleges that Du Pont has taken over Conoco's methanol-consuming operation and supplies them with Du Pont – produced methanol, thus preempting or foreclosing sales to Conoco by other methanol producers. The alleged injury would be the result of a vertical integration of the methanol-related operations of Du Pont and Conoco. Vertical integration can be a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, but only if the arrangement may lessen or tend to create a monopoly. In order to determine whether a merger runs afoul of this standard, it is usually necessary to make an analysis of numerous factors, including the purpose of merger, the relevant product and geographic markets, the market shares of the merging companies, the degree of vertical integration of the relevant markets, and historical trends covering the growth and structure of the market, *Brown Shoe Co. v. United States*, 370 U.S. 284, 328-34 (1962); *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, 351-52 (2d Cir. 1979); *Heatransfer Corp. v. Volkswagenwork A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). In this case, however, two undisputed facts obviate necessity of undertaking such an analysis. The first fact is that since the merger Du Pont has divested or shut down the methanol-consuming operations it acquired from Conoco. The second fact is that even before the merger Conoco had no plans to purchase methanol from Alberta Gas.

1. *The Divestiture or Termination of Conoco's Methanol-Consuming Operations.*

The following facts are not in dispute: Conoco operated two methanol-consuming plants prior to the merger. Together these plants consumed 8.7 million gallons of methanol in 1980 (Final Pre-Trial Stipulation, Stipulation of Facts at ¶ 32; Aff. of B.D. Ratcliff, 6/10/86, at 2). One of the plants, a cresacrylics plant in Newark, New Jersey, ceased operation in May 1983, and has since been dismantled. The other, a methyl chloride plant in Lake Charles, Louisiana, was sold to Vista Chemical Company, an independent company on July 20, 1984 (Aff. of B.D. Ratcliff at 2).

If Du Pont had ever been able to foreclose sales of methanol to Conoco for use in these plants by virtue of the merger, it no longer retains this ability. The Lake Charles plant is now owned by an independent entity which is, for all that appears in the record, free to purchase methanol from any source. The Newark plant no longer exists.

According to an uncontradicted affidavit submitted by Du Pont, Conoco has consumed methanol at the rate of less than 500,000 gallons per year since the closing of the two plants. None of this methanol is purchased from Du Pont (Aff. of John McMahon, 6/11/86, at 3.) Moreover, even if this methanol *were* supplied by Du Pont, the amount of possible foreclosure is *de minimus* in comparison with Alberta Gas' 1985 U.S. sales of 83 million gallons. (Final Pre-Trial Stipulation, Stipulation of Facts at ¶ 16.) *Brown Shoe*, 370 U.S. at 329.

Alberta Gas alleges that Du Pont currently delivers 100 million gallons of methanol to Conoco per year. This assertion is based on a gross misreading of a "Tolling and Purchase Agreement" between Bradywine Industrial Gas Co., a subsidiary of Conoco, and Du Pont. Under this agreement, gas belonging to Bradywine is converted to methanol at a Du Pont plant, and is then purchased by Du Pont (Ex. A, Aff. of General J. Donelly, 6/26/86). Alberta Gas does not explain how this transaction, in which gas belonging to Conoco is converted into methanol belonging to Du Pont, indicates a sale of methanol from Du Pont to Conoco.

Alberta Gas also asserts that a tolling agreement between Du Pont and Phillips Petroleum Company is evidence that Du Pont is selling methanol on the so-called "merchant market" that is, to entities outside Du Pont itself. Whatever the merits of that assertion, this Court sees nothing to prohibit Du Pont from selling methanol to whomever it pleases.

I find as a fact, based upon the undisputed facts described above, that the Du Pont-Conoco merger has not foreclosed the sale of methanol to Conoco in a manner that would tend to lessen

operation or create monopoly in the period after the closure of Conoco's two methanol-consuming plants.

We are left with a very short period, from the fall of 1981 until July 1984, when Alberta Gas was arguably foreclosed from selling methanol for use at Conoco's Newark and Lake Charles plants.

However, Alberta Gas has not even attempted to quantify the damages it has suffered or a result of its alleged lost sales to these plants. It has not shown that it ever sold, attempted to sell, or expected to sell methanol to Conoco. On the other hand, Du Pont's Trial Exhibit ¶ 136, which is not objected to on any grounds by Alberta Gas, is persuasive evidence that Conoco had no plan to purchase methanol from Alberta Gas in the period 1981-1984. The document is Conoco's Five Year Chemical Purchase Plan for the years 1981-1985. It is dated December 1980. It shows that Conoco intended to supply its Newark plant with methanol purchased from Du Pont and from Tenneco, Inc., and to supply its Lake Charles plant with methanol purchased from Du Pont and Celanese Corp. Alberta Gas is mentioned only as one of six other "potential suppliers."

An antitrust plaintiff "must show both that the antitrust laws have been violated and that it has suffered fact of damage in consequence of that violation." *American Bearing Co. v. Lilton Industries*, 729 F.2d 943, 952 (3d Cir. 1984); *Pitchford v. Pepsi*, 531 F.2d 92, 98 (3d Cir. 1976). On this record, there is no possibility that Alberta Gas will be able to show damages from any lost sales due to the merger. Du Pont's motion for summary judgment on this issue will be granted.

III. *Injunctive Relief.*

Alberta Gas seeks an injunction dissolving the Du Pont-Conoco merger. As Du Pont no longer owns or operates Conoco's methanol-consuming plants, an injunction is not warranted on any alleged vertical integration violation. However, in my order and opinion of June 5, I recognized that Du Pont had not moved for summary judgment on Alberta Gas' demand for

injunctive relief on its demand creation theory, but had restricted itself to a request for judgment on the damages claim.

Du Pont now moves for judgment on Alberta Gas's request for injunctive relief. This circuit has applied the same requirement of antitrust injury in suit for injunctive relief, which are governed by § 16 of the Clayton Act, as in suits for damages under § 4 of the Clayton Act, *Schoenhopf v. Brown & Williams Co.*, 637 F.2d 205, 211 (3d Cir. 1980). For the same reasons that the § 4 claims were disallowed, therefore, summary judgment will be granted to Du Pont on the claims for injunctive relief.

/s/ Herbert J. Stern

HERBERT J. STERN, U.S.D.J.

APPENDIX D

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 86-5662

ALBERTA GAS CHEMICALS LIMITED AND ALBERTA GAS CHEMICALS INCORPORATED,

Appellants,

vs.

E.I. DUPONT DE NEMOURS AND COMPANY, DU PONT HOLDINGS, INC. AND CONOCO INC.

(D.C.Civil 81-3024)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE -- DISTRICT OF NEW JERSEY - Newark

Present: WEIS, BECKER and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the -- District of New Jersey - Newark and was argued by counsel February 25, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 3, 1986, be, and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:

CLERK

August 17, 1987

Costs taxed in favor of Appellees as follows:

BRIEF $2,147.67

Certified as a true copy and issued in lieu of a formal mandate on September 18, 1987.

Test: /s/M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-5662

ALBERTA GAS CHEMICALS LIMITED and ALBERTA GAS CHEMICALS, INC.,

Plaintiffs-Appellants,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, DU PONT HOLDINGS, INC., and CONOCO, INC.,
(D.C.Civil No. 81-3024)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, BECKER, STAPLETON, MANSMANN, GREENBERG and HUNTER*, *Circuit Judges***.

The petition for rehearing filed by plaintiff-appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

* As to panel rehearing only.

** Honorable Dolores K. Sloviter did not participate in the consideration of this matter

BY THE COURT,
/s/ Weis
Circuit Judge

DATED: SEP 10, 1987

APPENDIX F

STATUTES INVOLVED
(in pertinent part)

CLAYTON ACT §4 (15 U.S.C. §15(a))

§15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

CLAYTON ACT §7 (15 U.S.C. §18)

§18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

CLAYTON ACT §16 (15 U.S.C. §26)

§26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . . In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.